TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 279.

OGDEN M. REID, PETITIONER,

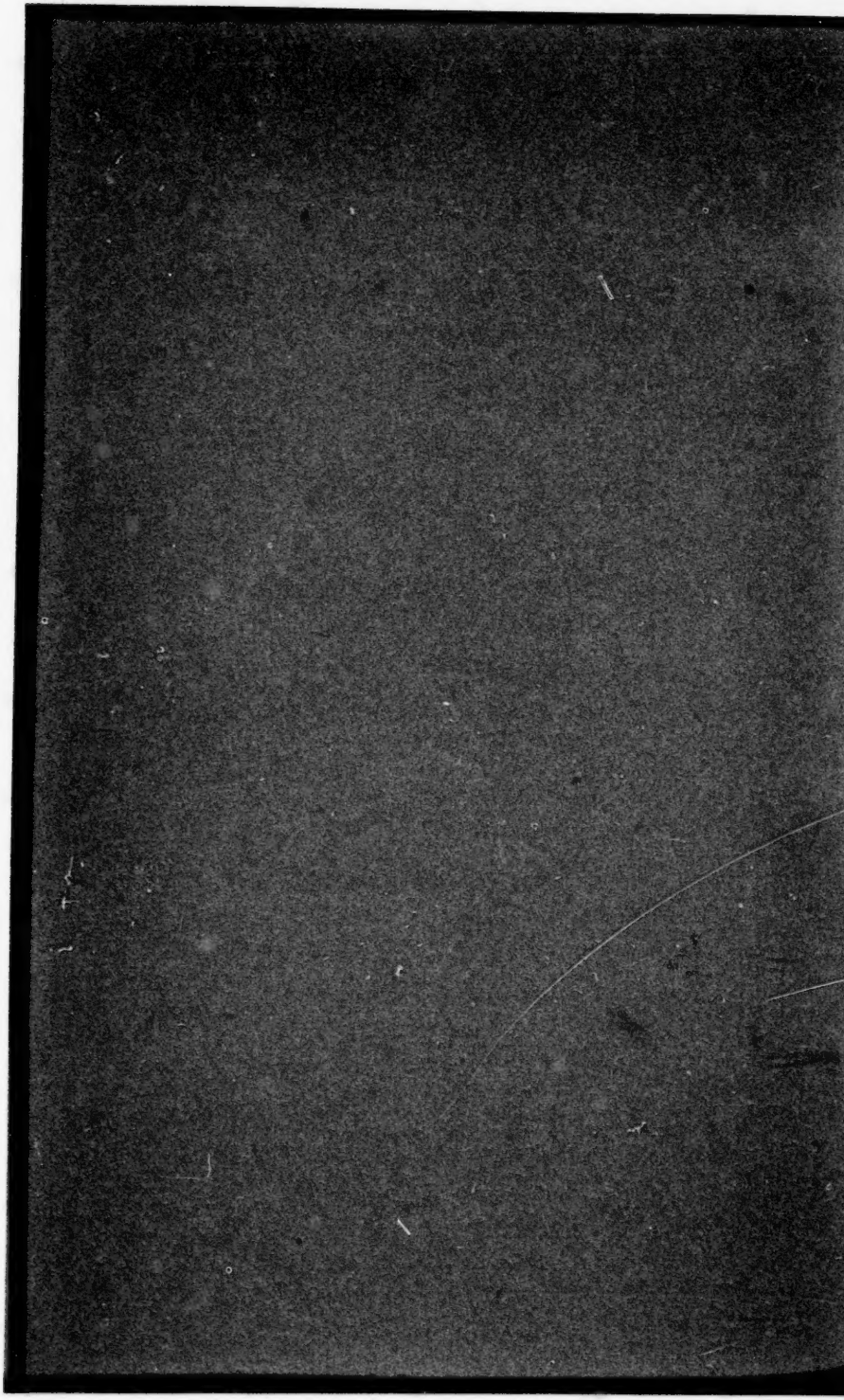
vs.

JAMES C. FARGO, AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 10, 1915.
CERTIORARI AND RETURN FILED DECEMBER 24, 1915.

(24,433)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 11, 1915.

1 United States District Court for the Southern District of New York.

OGDEN M. REID, Libellant,
against
JAMES C. FARGO, as President of American Express Company, and International Mercantile Marine Company, T. Hogan & Sons, Impleaded, Respondents.

Statement.

This action was commenced by the filing of a libel in the office of the Clerk of the District Court for the Southern District of New York, on the 21st day of November, 1911. Notice of appearance and stipulation for costs were filed by the respondent on December 28, 1911. On January 24, 1912, a petition praying that the International Mercantile Marine Company be impleaded was
2 filed, and on January 31, 1912, the International Mercantile Marine Company appeared in this case. On February 1st, 1912, the answer of James C. Fargo was filed. On March 1st, 1912, the answer to the petition to the impleading of the International Mercantile Marine Company, and answer to the libel was filed by the International Mercantile Marine Company. On March 14, 1912, a note of issue was filed, and on November 27, 1912, the petition of James C. Fargo for the impleading of T. Hogan & Sons was filed. T. Hogan & Sons filed their notice of appearance on December 12, 1912, and on December 26, 1912, the answers of respondents, T. Hogan & Sons to the petition and libel were filed. The trial of this case was had before Hon. Van Vechten Veeder on March 25th, 1913, and on March 28, 1913, the interlocutory decree in favor of the libellant holding T. Hogan & Sons primarily liable, and the respondent James C. Fargo as President of the American Express Company secondarily liable, and dismissing the petition as to the International Mercantile Marine Company was filed. On the same date the order of reference to the Honorable Herbert Green, by whom the amount of damage was ordered to be determined, was filed. On July 24th, the final decree was entered, and on July 30th, a notice of appeal, a bond for costs and for the amount of the judgment, together with an assignment of errors was filed by the respondent, T. Hogan & Sons.

3 *Libel.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel and complaint of Ogden M. Reid, against James C. Fargo, as President of the American Express Company, in a cause of contract, civil and maritime, respectfully shows and alleges:

First. Libellant is a resident of this District. The American Express Company is an incorporated association consisting of more than seven persons, and the respondent, James C. Fargo, is its President. The American Express Company is engaged as a common carrier of goods for hire, maintaining service as such throughout a large portion of the United States and foreign countries and between the City of London, England, and New York.

Second. On or about the 20th day of December, 1910, at London, England, in consideration of the sum of one hundred and fifty ($150.00) dollars, then paid to it by the libellant, the respondent agreed safely to carry by steamer to New York and there deliver to the libellant, or order, a Peerless motor car, No. 6244, the property of the libellant, of the value of about four thousand ($4,000.00) dollars, which the libellant then and there delivered to the respondent, and which the respondent then and there received upon the agreement and for the purposes aforementioned.

Third. That the respondent did not safely carry or deliver the said goods pursuant to said agreement, but, on the contrary, when delivered at New York the said automobile was so seriously damaged as to be practically a total loss.

4 Fourth. The libellant is informed and believes that the said automobile sustained the damage in question, by reason of being negligently permitted to fall overboard and into the waters of the Hudson River, while being unloaded on January 5th, 1911, from the steamer "Minnewaska," upon which vessel the respondent had caused the said automobile to be placed at the port of London, England, to be carried to the port of New York.

Fifth. By reason of the premises your libellant has sustained damage in about the sum of thirty-five hundred ($3500.00) dollars, no part of which has been paid, although duly demanded.

Sixth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays that a monition in due form of law, according to the course and practice of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said James C. Fargo, as President of the American Express Company, and that he be cited to appear and answer, upon oath, all and singular the premises aforesaid, and that this Honorable Court will be pleased to decree the payment of his damages aforesaid with interest and costs, and that he may have such other and further relief as in law and justice he may be entitled to receive.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant, 64 Wall Street, New York City.

5 STATE OF NEW YORK,
County of New York, ss:

Ogden M. Reid, being duly sworn, deposes and says that he is the libellant herein; that he has read the foregoing libel and knows the

contents thereof, and that the same is true of his own knowledge, information and belief.

OGDEN M. REID.

Sworn to before me this 17th day of November, 1911.

GEO. H. TURNER,

[SEAL.] *Notary Public, No. 71, New York County.*

Answer of Fargo.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of James C. Fargo, as President of the American Express Company, to the libel and complaint of Ogden M. Reid, in a cause of contract, civil and maritime, shows to this Court:

First. Answering the allegations contained in the first article of said libel, respondent denies that he has any knowledge or information sufficient to form a belief as to whether or not the libellant is a resident of this district; respondent further denies upon information and belief that the American Express Company is an incorporated association consisting of more than seven persons and alleges that the

6 American Express Company is an unincorporated association consisting of more than seven persons and that James C. Fargo is the president thereof; and respondent admits that the American Express Company is engaged in the business of a common carrier of property for hire in a part of the United States and between certain foreign countries and the United States, but denies upon information and belief that the American Express Company is engaged in the business of a common carrier between London, England, and New York.

Second. Respondent denies upon information and belief each and every allegation contained in the second article of the said libel, except that he admits that on or about the 20th day of December, 1910, at London, England, one Thomas Stevens delivered to the American Express Company a Peerless motor car, No. 6244, to be forwarded by said Company pursuant to certain instructions, partly printed and partly written and hereinafter set forth, and paid to the American Express Company therefor the sum of $150; but respondent denies that he has any knowledge or information sufficient to form a belief either that the libellant was the owner of said motor car or that the value of said motor car was about $4,000.

Third. Answering the allegations contained in the third article of the libel, the respondent denies upon information and belief that there was any agreement made by the American Express Company with the libellant to safely carry to and deliver said motor car at New York, but respondent admits that when said motor car was delivered at New York it was in a damaged condition.

Fourth. Answering the allegations contained in the fourth article of the libel, respondent admits that the said motor car sus-

7 tained the damage in question by reason of being negligently permitted to fall overboard into the waters of the Hudson

River while being unloaded on January 5th, 1911, from the steamship "Minnewaska," but denies upon information and belief that the American Express Company delivered or caused said motor car to be placed aboard the steamship "Minnewaska" at London, England, to be carried to New York.

Fifth. Respondent denies that he has any knowledge or information sufficient to form a belief either that the libellant has been damaged or as to the extent of the injuries sustained by the said motor car, but admits that no part of $3,500, the amount of damages alleged to have been sustained by said motor car, has been paid.

Sixth. Respondent denies upon information and belief the allegations contained in the sixth paragraph of the libel except that he admits the jurisdiction of this Honorable Court.

The Respondent further answering the libel and complaint, and for a separate, distinct and complete defense, alleges upon information and belief as follows:

Seventh. That on or about the 20th day of December, 1910, one Thomas Stevens at London, England, delivered to the American Express Company a Peerless motor car, No. 6244, and at the same time delivered to said Company certain instructions, partly printed and partly written, and duly signed by him, wherein he requested said Company to forward said motor car consigned to himself by steamer in bond to New York and directed that no insurance be effected thereon; that said Company received said motor car as the forwarding agent of the shipper and agreed with him to deal with
8 said motor car in accordance with the instructions of the shipper, but subject to the terms and conditions forming a part of said instructions and defining the liability of said Company.

Among the terms and conditions contained in said instructions were the following:

"1. The shipment covered by this declaration is only accepted by the American Express Company as a Forwarding agent for the shipper, subject to the Bills of Lading, regulations and liability of the different Railways, Transportation Companies, Steamers, Carriers and others through whose hands it may pass. All risk and responsibility of said American Express Company for loss, damage or delay to said property will cease on delivery in transit to such Railway, Transportation Company, Steamer, Carrier or other person necessarily employed in the handling and transportation of the shipment from point of origin to destination.

* * * * * * *

"6. The American Express Company is not to be held liable for any loss or damage except as a forwarding agent, only, nor for any loss, damage or delay, by fire, by the dangers of navigation, by the acts of God or the enemies of the Government, by the restraints of Governments, mobs, strikes, riots, insurrections, pirates, or from, or by reason of, any of the hazards or dangers incidents to a state of war.

"7. Nor shall the American Express Company be liable for any default or negligence of any person, corporation or association
9 to whom the within described property shall or may be delivered by this Company, for the performance of any act

or duty in respect thereto, at any place or point off the established routes or lines run by this Company; and any such person, corporation or association, is not to be regarded, deemed or taken to be the agent of this company for any such purpose, but, on the contrary, such person, corporation or association shall be deemed and taken to be the agent of the person, corporation or association from whom this Company received the property within described. It being understood that this Company relies upon the various Railroad and Steamship lines, for its means of forwarding property, it is agreed that it shall not be liable for any losses or damages caused by the detention of any Railway train or any Steamship or other vehicle upon which the said property shall be placed for transportation; nor by the neglect or refusal of any Railroad Company, or other transportation line to receive and forward the said property; nor shall this Company be liable for any losses or damages caused by detention of said property due to Customs Regulations or by errors and insufficiency in the marks, addresses, or shipping numbers of packages.

* * * * * * *

"11. It is further agreed that any carrier or party liable on account of loss or damage to any of the within described property, shall have the full benefit of any insurance that may have been effected upon or on account of said property."

* * * * * * *

10 "16. It is understood and agreed that no goods shipped by or through this Company will be insured against General Average, perils of the sea, fire, pilferage, breakage, damage by water (or other liquids), steam, dampness or mildew, unless shipper's special instructions to insure are written in the declaration form or advice note, premium paid in accordance with the kind of insurance required, and a special Memorandum of Insurance covering such risks, is handed to the shipper by the Company. The Company's charges, unless insurance is effected, will cover transportation only. Leakage or deterioration of goods will not be covered by insurance."

That on or about December 24th, 1910, at Southampton, England, the American Express Company, as the forwarding agent of the shipper, pursuant to the instructions of the shipper and subject to the terms and conditions therein contained, delivered said motor car in the same condition in which it was received to the International Mercantile Marine Company, to be forwarded by steamer in bond to New York, and paid therefor to said Steamship Company the sum of $109.61, and received from said Steamship Company a B/L for the transportation of said motor car by the S/S "Minnewaska" to New York, whereupon sair Express Company had entirely performed its obligation in respect to the shipment of said motor car.

That said steamship "Minnewaska" thereafter proceeded to New York and in the process of unloading said motor car from said steamship upon her arrival at New York the International Mercantile Marine Company or its employees or servants negligently

permitted said motor car to fall overboard into the waters
11 Hudson River, thus causing to said motor car the damag
complained of in this libel, and for which this responden
is not liable.

Wherefore respondent asks that the libel and complaint be di
missed with costs.

CARTER, LEDYARD & MILBURN,
Proctors for Respondent, 54 Wall Street,
Borough of Manhattan, New York City.

STATE OF NEW YORK,
Southern District of New York, ss:

James C. Fargo, being duly sworn, deposes and says that he
the President of the American Express Company, a voluntary unin
corporated association, and as such is the respondent in the abov
proceeding; that he has read the foregoing answer and knows th
contents thereof; that the same is true to his own knowledge excep
as to the matters there stated to be alleged upon information an
belief, and that as to those matters he believes it to be true.

JAS. C. FARGO.

Sworn to before me this 1st day of February, 1912.
[SEAL.] WALTER H. MERRITT,
Notary Public, New York County.

County Clerk's Number 156.
Register's Number 3095.

12 *Petition Against International Mercantile Marine Company.*

To the Honorable the Judges of the District Court of the United
States, for the Southern District of New York:

The Petition of James C. Fargo, as President of the American
Express Company, proceeded against upon the Libel of Ogden M
Reid, in an alleged cause of Contract Civil and Maritime, respect
fully shows:

1. That at all the times hereinafter mentioned, the Petitioner
who is the respondent named in a suit in Admiralty in an alleged
cause of contract, civil and maritime, brought in this district by
Ogden M. Reid, as Libellant, was and now is the President of the
American Express Company, and that said American Express Com
pany is an unincorporated association, consisting of more than seven
persons, doing business as a common carrier, with its principal office
and place of business in the Borough of Manhattan. City of New
York, within this district.

2. That at all the times hereinafter mentioned, the International
Mercantile Marine Company was and now is a corporation organized
and existing under and by virtue of the laws of the State of New
Jersey, having an office and place of business in the Borough of
Manhattan, City of New York, within this district, and engaged in

the business of a common carrier of passengers and property for hire between the British Isles and the Continent of Europe and the United States, and in such capacity operates and maintains a steamship line or lines between said countries, and that one of the steamships occasionally used from time to time by said company in its service between Southampton, England, and New York, is the "Minnewaska."

13 3. That on or about November 21, 1911, the libel herein was filed, praying for the payment of three thousand five hundred dollars ($3,500) as damages for the breach of an alleged contract safely to carry and transport a certain automobile from London, England, to New York.

4. Said libel alleges that on or about the 20th day of December, 1910, at London, England, in consideration of the payment of one hundred and fifty dollars ($150) by the Libellant, the Respondent agreed safely to carry by steamer from London, England, to New York, and there deliver to the libellant a certain automobile; that pursuant to said agreement the libellant at London, England, delivered said automobile to the respondent; that said automobile when delivered at New York was seriously damaged to the extent of three thousand five hundred dollars ($3,500), and that said damage was caused by reason of the automobile being negligently allowed to fall overboard into the water of the Hudson River in New York Harbor, on the fifth day of January, 1911.

5. Upon information and belief, petitioner alleges that said automobile was transported under the following circumstances, and was damaged as hereinafter recited:

That on or about the 21st day of December, 1910, at London, England, under and pursuant to certain printed and signed instructions delivered to it by the duly authorized agent of the libellant, the American Express Company, at London, England, received from the libellant a certain automobile, the subject matter of this suit, and consigned to one Thomas Stevens, and agreed, subject to certain printed conditions, terms and notations on said printed instructions, to forward said automobile by steamer in bond to New York.

14 6. That on or about the 24th day of December, 1910, at Southampton, England, in consideration of the sum of one hundred and nine and 61/100 dollars ($109.61) paid to it by the American Express Company, the International Mercantile Marine Company agreed with the American Express Company to carry and transport by a certain steamship called the "Minnewaska," from Southampton, England, to New York, the said automobile, and to deliver the same at New York unto the American Express Company, in like good order and condition as when received.

7. That on or about the 24th day of December, 1910, pursuant to said agreement, the American Express Company, at Southampton, England, delivered said automobile in good order and condition to the International Mercantile Marine Company for the purposes aforesaid; that said International Mercantile Marine Company received said automobile from the American Express Com-

pany, and in consideration of the sum of one hundred and nine and 61/100 dollars ($109.61) paid to it by the American Express Company, delivered to said American Express Company a bill of lading in which it agreed to deliver said automobile at New York City in like good order and condition as when received.

8. That the International Mercantile Marine Company did not safely deliver said automobile unto the American Express Company, at New York, but, on the contrary, while in the possession of the International Mercantile Marine Company, said automobile sustained the damage of which Ogden M. Reid complains in this suit, and delivered said automobile to the American Express Company at New York City very badly damaged and in almost a worthless condition.

15 9. That said automobile was damaged solely by the negligence of the International Mercantile Marine Company and its employees in negligently allowing said automobile to fall overboard in the waters of the Hudson River, New York Harbor, while said automobile was being discharged from the Steamship "Minnewaska."

10. That no answer to said libel has yet been filed.

11. That all and singular the process- are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your petitioner prays that a citation may issue against the International Mercantile Marine Company citing it to appear and answer all and singular the matters aforesaid; that said International Mercantile Marine Company be made a party to this suit and if it appears on the trial of this cause that the libellant is entitled to damages for breach of contract, that this Honorable Court will be pleased to make a decree adjudging the said International Mercantile Marine Company liable therefor with all the costs of this suit, and that your petitioner may have such other and further relief as may be just.

CARTER, LEDYARD & MILBURN,
Proctors for Petitioner.

STATE OF NEW YORK,
County of New York, ss:

J. C. Fargo, being duly sworn, deposes and says that he is President of the American Express Company, and as such is the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own

16 knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

JAMES C. FARGO.

Sworn to before me this 23rd day of January, 1912.

WALTER H. MERRITT,
Notary Public, New York County.

Answer of the International Mercantile Marine Company to Petition.

To the Honorable, the Judges of the District Court of the United States for the Southern District of New York:

The answer of the International Mercantile Marine Company to the petition of James C. Fargo, as President of the American Express Company in the suit of Ogden M. Reid against said Fargo, as said President, in an alleged cause of contract, civil and maritime, alleges as follows:

First. It admits the first, second, third, fourth and tenth articles of the petition.

Second. It denies that it has any knowledge or information sufficient to form a belief as to the allegations of the fifth article of the petition.

Third. It denies the allegations contained in the sixth article of the petition, except that it admits that on or about the 24th day of December, 1910, a contract was entered into between the
17 American Express Company and this respondent, as is set forth in a certain bill of lading, a copy whereof is hereto annexed as Exhibit B, and made a part hereof.

Fourth. It denies the allegations contained in the seventh article of the petition, except that it admits that on or about the 24th day of December, 1910, it received from the American Express Company one case said to contain an automobile, condition, contents and value unknown, for which it issued its bill of lading aforesaid.

Fifth. It denies the allegations of the eighth article of the petition, except that it admits that while in its possession said case sustained damage, the extent of which damage this respondent does not know.

Sixth. It denies each and every allegation of the ninth article of the petition.

Seventh. It admits the jurisdiction of this Honorable Court, and denies the other allegations of the eleventh article of the petition.

Eighth. Further answering, the respondent alleges that the bill of lading aforesaid contained the following:

"Sec. 1. It is also mutually agreed that the value of each package shipped hereunder does not exceed $100 or its equivalent in English currency on which basis the freight is adjusted, and the carrier's liability shall in no case exceed that sum unless a value in excess thereof be specially declared and stated herein, and extra freight as may be agreed on paid."

18 "And finally, in accepting this bill of lading, the Shipper, Owner, and Consignee of the goods, and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions, and conditions, whether written or printed as fully as if they were all signed by such Shipper, Owner, Consignee, or Holder."

Thirteenth. No value in excess of the sum of $100 was declared for the shipment hereinbefore stated and no extra freight thereon paid, and the liability of this respondent can in no case exceed the said sum of $100, which sum it has tendered to the petitioner, and

it hereby offers to allow a decree to be taken against it for said amount in accordance with Rule 30.

Wherefore, the respondent prays that the petition herein be dismissed, with costs.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent, International Mercantile Marine Co.

Office & P. O. Address, 27 William Street, New York City.

CITY OF NEW YORK,
Southern District of New York, ss:

Emerson E. Parvin, being duly sworn, says that he is the secretary and an officer of the International Mercantile Marine Company, the corporation respondent in the above entitled action; that the foregoing answer is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason why this verification is not made by the re-
19 spondent is because the respondent is a corporation; that the grounds of deponent's belief as to all matters in said answer not stated upon his knowledge are investigations which deponent has caused to be made concerning the subject matter of this action and information acquired by deponent in the course of his duties as an officer of the corporation respondent in this action.

EMERSON E. PARVIN, *Secretary.*

Sworn to before me this 28th day of February, 1912.
[SEAL.] F. RIDGWAY,
Notary Public, Kings County.

Certificate filed in New York County.

Answer of the International Mercantile Marine Company to the Libel.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The International Mercantile Marine Company, impleaded with James C. Fargo, as President of the American Express Company, in the suit of Ogden M. Reid, against said Fargo as President in an alleged cause of contract, civil and maritime, answering the libel, alleges as follows:

First. It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in the
20 first, second, third and fifth articles of the libel.

Second. It denies the allegations contained in the fourth article of the libel, except that it admits that the respondent, Fargo, caused a certain case, said to contain an automobile in good order and condition to be placed on board a certain steamship, the Minnewaska, at Southampton, to be carried to New York.

Third. It admits the jurisdiction of this Honorable Court and denies the other allegations contained in the sixth article of the libel.

Wherefore, respondent prays that the libel be dismissed with costs.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent, International Mercantile Marine Co.

Office and P. O. Address, 27 William Street, Borough of Manhattan, New York City.

CITY OF NEW YORK,
Southern District of New York, ss:

Emerson E. Parvin, being duly sworn, says that he is the secretary and an officer of the International Mercantile Marine Company, the corporation respondent in the above-entitled action; that the foregoing answer is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason why this verification is not made by the respondent is because the respondent is a corporation; that the grounds
21 of deponent's belief as to all matters in said answer not stated upon his knowledge are investigations which deponent has caused to be made concerning the subject-matter of this action and information acquired by deponent in the course of his duties as an officer of the corporation respondent in this action.

EMERSON E. PARVIN, *Secretary.*

Sworn to before me this 28th day of February, 1912.

F. RIDGWAY,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York County.

Petition Against T. Hogan & Sons.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The petition of James C. Fargo, as President of the American Express Company, proceeded against upon the Libel of Ogden M. Reid, in an alleged cause of contract Civil and Maritime, respectfully shows:

1. That at all the times hereinafter mentioned the petitioner, who is the respondent named in a suit in Admiralty in an alleged cause of contract, civil and maritime, brought in this District by Ogden M. Reid, as libellant, was and now is the President of the American Express Company and that said American Express Company is an unincorporated association, consisting of more
22 than seven persons, doing business as a common carrier with its principal office and place of business in the Borough of Manhattan, City of New York, within this district.

2. That at all the times hereinafter mentioned T. Hogan & Sons was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, having an office at 108 Produce Exchange, Borough of Manhattan, City and County of New York, and engaged at New York in the business of stowing and unloading steamships, and in particular the steamships of the American Line, operated by the International Mercantile Marine Company.

3. That on or about November 21, 1911, the libel herein was filed, praying for the payment of three thousand five hundred dollars ($3,500) as damages for the breach of an alleged contract safely to carry and transport a certain automobile from London, England, to New York.

Said libel alleges that on or about the 20th day of December, 1910, at London, England, in consideration of the payment of one hundred and fifty dollars ($150) by the libellant, the respondent agreed safely to carry by steamer from London, England, to New York, and there deliver to the libellant a certain automobile; that pursuant to said agreement the libellant at London, England, delivered said automobile to the respondent; that said automobile when delivered at New York was seriously damaged to the extent of three thousand five hundred dollars ($3,500), and that said damage was caused by reason of the automobile being negligently allowed to fall overboard into the water of the Hudson River in New York Harbor, on the fifth day of January, 1911.

On or about January 24, 1912, the respondent James C. Fargo petitioned this Court to make the International Mercantile
23 Marine Company a party to this suit, and thereafter, on or about the 1st day of March, 1912, the International Mercantile Marine Company filed its answer in which it pleaded that its liability under the bill of lading issued by it covering the shipment of said automobile was limited to $100.

On or about the 1st day of February, 1912, the respondent James C. Fargo filed his answer to this libel.

4. Upon information and belief, petitioner alleges that said automobile was transported under the following circumstances, and was damaged as hereinafter recited:

That on or about the 21st day of December, 1910, at London, England, under and pursuant to certain printed and signed instructions delivered to it by the duly authorized agent of the libellant, the American Express Company at London, England, received from the libellant a certain automobile, the subject matter of this suit, and consigned to one Thomas Stevens, and agreed, subject to certain printed conditions, terms and notations on said printed instructions, to forward said automobile by steamer in bond to New York.

5. That on or about the 24th day of December, 1910, at Southampton, England, in consideration of the sum of one hundred and nine and 61-100 dollars ($109.61) paid to it by the American Express Company, the International Mercantile Marine Company agreed with the American Express Company to carry and trans-

port by a certain steamship called the "Minnewaska," from Southampton, England, to New York the said automobile, and to deliver the same at New York unto the American Express Company, in like good order and condition as when received.

24 6. That on or about the 24th day of December, 1910, pursuant to said agreement, the American Express Company, at Southampton, England, delivered said automobile in good order and condition to the International Mercantile Marine Company for the purposes aforesaid; that said International Mercantile Marine Company received said automobile from the American Express Company, and in consideration of the sum of one hundred and nine and 61-100 dollars ($109.61) paid to it by the American Express Company, delivered to said American Express Company a bill of lading in which it agreed to deliver said automobile at New York City in like good order and condition as when received.

7. That the International Mercantile Marine Company engaged T. Hogan & Sons to unload the said automobile from said steamship "Minnewaska" at New York, and said T. Hogan & Sons, its employees or servants, in unloading said automobile, negligently allowed the case containing said automobile, when it was suspended in air by a tackle or other contrivance, to fall therefrom into the Hudson River in New York Harbor, thereby sustaining the damage of which Ogden M. Reid complains in this suit.

8. That all and singular the process are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your petitioner prays that a citation may issue against T. Hogan & Sons, citing it to appear and answer all and singular the matters aforesaid; that said International Mercantile Marine Company be made a party to this suit, and if it appears on the trial of this cause that the libellant is entitled to damages for

25 breach of contract, that this Honorable Court will be pleased to make a decree adjudging the said T. Hogan & Sons liable therefor, with all the costs of this suit, and that your petitioner may have such other and further relief as may be just.

JAMES C. FARGO,
CARTER, LEDYARD & MILBURN,
Proctors for Respondent, James C. Fargo, etc.

STATE OF NEW YORK,
County of New York, ss:

James C. Fargo, being duly sworn, deposes and says that he is president of the American Express Company, and as such the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

JAMES C. FARGO.

Sworn to before me this 26th day of November, 1912.

WALTER H. MERRITT,
[SEAL.] *Notary Public, New York County.*

County Clerk's No. 156.
Register's No. 3096.

26 *Answer of T. Hogan & Sons, Inc., to Petition of James C. Fargo.*

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of T. Hogan & Sons, Inc., to the petition of James C. Fargo, as President of the American Express Company in the suit of Ogden M. Reid against said Fargo, as said President in an alleged cause of contract, civil and maritime, alleges as follows:

First. It admits the first, second and third articles of the petition.

Second. It denies any knowledge or information sufficient to form a belief as to each and every allegation of articles fourth, fifth and sixth of the petition.

Third. That T. Hogan & Sons, Inc., was employed to unload the steamship "Minnewaska" at New York. Although the operation of unloading was conducted with all reasonable care and this respondent and its employees were not guilty of any negligence yet through no fault of theirs, the sling in which the automobile was suspended broke and the said automobile fell into the Hudson River. Said sling was not the property of this respondent, but was furnished to it by those who employed this respondent to unload the vessel. Except as admitted above, this respondent denies each and every allegation of the seventh article of the petition.

Fourth. It admits the jurisdiction of this Honorable Court, and denies the other allegations of the eighth article of the petition.

Fifth. Further answering, the respondent alleges, on information and belief, that the liability of the International Mer-
27 cantile Marine Company, under their bill of lading, was limited to $100, and that at the time the alleged damage occurred the said automobile was in the custody of the International Mercantile Marine Company, or its agents, and was being carried in accordance with the said bill of lading.

Wherefore, the respondent prays that the petition herein be dismissed with costs.

O'BRIEN, BOARDMAN & PLATT,
Proctors for Respondent, T. Hogan & Sons, Incorporated.

Office & P. O. Address, 2 Rector Street, New York City.

CITY OF NEW YORK,
Southern District of New York, ss:

Elick Berlinger, being duly sworn, says that he is the Secretary and an officer of T. Hogan & Sons, Inc., the corporation respondent

in the above-entitled action; that the foregoing answer is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason why this verification is not made by the respondent is because the respondent is a corporation; that the grounds of deponent's belief as to all matters in said answer not stated upon his knowledge are investigations which deponent has caused to be made concerning the subject matter of this action and information acquired by deponent in the
28 course of his duties as an officer of the corporation respondent in this action.

ELICK BERLINGER.

Sworn to before me this 26th day of December, 1912.

FRITZ BEHR,
Notary Public, New York County.

New York County No. 329.
New York Register No. 3378.

Answer of T. Hogan & Sons, Inc., to Libel.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

T. Hogan & Sons, Inc., impleaded with James C. Fargo, as President of the American Express Company, in the suit of Ogden M. Reid against said Fargo as President, in an alleged cause of contract, civil and maritime, answering the libel, alleges as follows:

First. It denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in the first, second, third and fifth articles of the libel.

Second. It admits that the automobile fell into the waters of the Hudson River while being unloaded from the steamer "Minnewaska," but denies that it was negligently permitted to fall overboard, and alleges that this respondent was employed to unload the steamship "Minnewaska" at New York. Although the
29 operation of unloading was conducted with all reasonable care and this respondent and its employees were not guilty of any negligence, yet through no fault of theirs the sling in which the automobile was suspended broke and the said automobile fell into the Hudson River. Said sling was not the property of this respondent, but was furnished to it by those who employed this respondent to unload the vessel. It denies that it has any knowledge or information sufficient to form a belief as to the remaining allegations of article fourth of the libel.

Third. It admits the jurisdiction of this Honorable Court, and denies the other allegations contained in the sixth article of the libel.

Wherefore, respondent prays that the libel be dismissed with costs.

O'BRIEN, BOARDMAN & PLATT,
Proctors for Respondent, T. Hogan & Sons, Inc.

Office & P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

CITY OF NEW YORK,
Southern District of New York, ss:

Elick Berliner, being duly sworn, says, that he is the Secretary and an officer of T. Hogan & Sons, Inc., the corporation respondent in the above entitled action; the foregoing answer is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason why this verification is not made by the respondent is because the respondent is a corporation; that the grounds of deponent's belief as to all matters in said answer not stated upon his knowledge are investigations which deponent has caused to be made concerning the subject matter of this action and information acquired by deponent in the course of his duties as an officer of the corporation respondent in this action.

ELICK BERLINGER.

Sworn to before me this 26th day of December, 1912.
FRITZ BEHR,
Notary Public, New York County.

New York County No. 329.
New York Register No. 3378.

United States District Court, Southern District of New York.

Before Hon. Van Vechten Veeder, Judge.

OGDEN M. REID
against
JAMES C. FARGO, &c., et al.

New York, March 25, 1913.

Interrogatories Propounded by Respondent James C. Fargo, as President of the American Express Company, to the International Mercantile Marine Company and Which it is Required to Answer Under Oath.

First Interrogatory. On and after December 31st, 1909, did the International Mercantile Marine Company have a printed schedule of rates to be charged on various articles to be shipped from Southampton and London, England, including automobiles in cases?

Second Interrogatory. If you answer the first interrogatory in the affirmative, is the schedule hereto annexed as Exhibit A a copy of said schedule.?

Third Interrogatory. If you answer the first and second interrogatories in the affirmative did the International Mercan-
32 tile Marine Company, prior to December 24th, 1910, give the American Express Company a copy of said schedule of rates?

Fourth Interrogatory. If you answer the first and second interrogatories in the affirmative, was not said schedule so far as it affected automobiles shipped in cases in force on December 24th, 1910?

Ninth Interrogatory. On or about December 24, 1910, did the International Mercantile Marine Company receive from the American Express Company a paper known as a Specification for Foreign and Colonial Merchandise signed by the American Express Company and relating to the automobile involved in this action in which it was stated that the value of said automobile was eight hundred pounds (£800)?

EXHIBIT A.

American Line—White Star Line.

Southampton to New York Services.

Freight Rates from Southampton and London Warehouses to New York.

From January 1st, 1910, Subject to Thirty Days' Notice.

Goods.	Southampton to New York.	London Warehouse to New York.
Apparel	30/– and 10 per cent. measurement	35/– and 10 per cent. measurement
Artists' Materials	25/– and 10 " " or half per cent. & 10 per cent. ad valorem.	30/– and 10 " " or half per cent. & 10 per cent. ad valorem.
Automobiles (cased)	25/– and 10 per cent. measurement	30/– and 10 per cent. measurement
Basketware	12/6 and 10 " "	15/– net measurement
Bicycles	15/– and 10 " "	17/6 and 10 per cent. measurement
Biscuits	15/– and 10 " "	20/– and 10 " "
Books	25/– and 10 " "	30/– and 10 " "
Boots and Shoes	22/6 and 10 " "	27/6 and 10 " "
Bristles	22/6 and 10 " " or half per cent. & 10 per cent. ad valorem.	27/6 and 10 " " or half per cent. & 10 per cent. ad valorem.
Brushware	22/6 and 10 per cent. measurement	27/6 and 10 per cent. measurement
Bucha Leaves	12/6 and 10 " "	15/– net
Bulbs	20/– and 10 " "	25/– and 10 per cent. measurement
Candles and Night Lights	15/– and 10 " "	20/– and 10 " "
Carpets	27/6 and 10 " " or half per cent. and 10 per cent.	30/– and 10 " " ad valorem, ship's option.

Confectionery	17/6 and 10 per cent. measurement	22/6 and 10 per cent. measurement
Cheese	25/– and 10 per cent. weight	35/– and 10 per cent. weight
Chinaware	15/– and 10 per cent. measurement or half per cent. and 10 per cent.	17/6 and 10 per cent. measurement ad valorem, ship's option.
Corks and Bungs	12/6 and 10 per cent. measurement	15/– and 10 per cent. measurement
Curios	25/– and 10 " " or half per cent. and 10 per cent.	30/– and 10 " " ad valorem, ship's option.
Drapery	30/– and 10 per cent. measurement or half per cent. and 10 per cent.	35/– and 10 per cent. measurement ad valorem, ship's option.
Drugs and Druggists' Sundries	25/– and 10 per cent. measurement or half per cent. and 10 per cent.	30/– and 10 per cent. measurement ad valorem, ship's option.
Earthenware	15/– and 10 per cent. measurement	17/6 and 10 per cent. measurement
Effects, not Furniture	30/– and 10 " "	35/– and 10 " "
Eggs	22/6 net measurement	25/– net measurement
Electro Plate	25/– and 10 per cent. measurement or half per cent. and 10 per cent.	30/– and 10 per cent. measurement ad valorem, ship's option.
34		
Empty Bottles	12/6 net measurement	15/– net measurement
Embroideries	30/– and 10 per cent. measurement or half per cent. and 10 per cent.	35/– and 10 per cent. measurement ad valorem, ship's option.
Engravings and Etchings	25/– and 10 per cent. measurement or half per cent. and 10 per cent.	30/– and 10 per cent. measurement ad valorem, ship's option.
Feathers (under £40 per 40 cubic feet)	12/6 and 10 per cent. measurement	15/– and 10 per cent. measurement
Feathers (over £40 per 40 cubic feet)	20/– and 10 " " or half per cent. and 10 per cent.	22/6 and 10 " " ad valorem, ship's option. Value to be declared on Bills of Lading.
Flowers, artificial (under £20 per 40 cb. ft.)	15/– net measurement	15/– and 10 per cent. maesurement

Goods.	Southampton to New York.	London Warehouse to New York.
Flowers, artificial (over £20 per 40 cb. ft.)	17/6 and 10 per cent.	20/– net
Fine Goods	30/– and 10 per cent. measurement	35/– and 10 " "
Floorcloth	15/– and 10 " "	22/6 and 10 " "
Furniture, household	20/ and 10 " "	22/6 and 10 " "
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Gin	22/6 and 10 per cent. measurement	30/– and 10 per cent. measurement
Glassware	15/– and 10 " "	17/6 and 10 " "
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Gloves, leather or kid	25/– and 10 per cent. measurement	30/– and 10 per cent. measurement
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Golf Balls and Clubs	20/– and 10 per cent. measurement	25/– and 10 per cent. measurement
Gum and Gum Copal	20/– and 10 per cent. weight	25/– and 10 per cent. weight
Haberdashery	30/– and 10 per cent. measurement	35/– and 10 per cent. measurement
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Hardware	25/– and 10 per cent. measurement	30/– and 10 per cent. measurement
	or weight at ship's option.	
Hair Pads	15/– net measurement	15/– and 10 per cent. measurement
Horsehair	40/– and 10 per cent. weight	50/– and 10 per cent. weight
	or half per cent. and 10 per cent.	ad valorem.
Horns and Horn Tips	32/6 and 10 per cent. weight	40/– and 10 " "
Hats (Silk)	25/– and 10 per cent. measurement	27/6 and 10 per cent. measurement
" (felt)	17/6 and 10 " "	20/– and 10 " "
Ivory	half per cent net ad valorem	half per cent. net ad valorem.
Ink	22/–6 and 10 per cent. measurement	30/– and 10 per cent. measurement
Instruments: Scientific, Optical and Mathematical	22/6 and 10 " "	27/6 and 10 " "
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Jewellery	One half per cent. and 10 per cent. ad valorem.	

Leather, dressed in cases (for immediate manufacture)	22/6 and 10 per cent. measurement or half per cent. and 10 per cent.	27/6 and 10 per cent. measurement ad valorem, ship's option.
Linens	30/– and 10 per cent. measurement	35/– and 10 per cent. measurement
Machinery, packages under 30 cwt.	35/– and 10 per cent. measurement	42/6 and 10 " "
	Ship's option, weight or measurement.	
Mantles.	30/– and 10 per cent. measurement	35/– and 10 per cent. measurement
Maps	25/– and 10 " "	30/– and 10 " "
Medicinal Leaves.	See Drugs.	
Mica	35/– and 10 per cent. weight	45/– and 10 per cent. weight
Mineral Waters	12/6 and 10 " "	20/– and 10 " "
Natural History Specimens other than corpse and cremated remains	35/– and 10 per cent. measurement or half per cent. and 10 per cent.	40/– and 10 per cent. measurement ad valorem, ship's option.
Preserves	17/6 and 10 per cent. measurement	22/6 and 10 per cent. measurement
Painters' Colours	20/– and 10 per cent. weight	27/6 and 10 per cent. weight
Paper, fine	25/– and 10 per cent. measurement	30/– and 10 per cent. measurement
Pens and Pen Nibs.	25/– and 10 " "	30/– and 10 " "
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Perfumery	25/– and 10 per cent. measurement or half per cent. and 10 per cent.	30/– and 10 per cent. measurement ad valorem, ship's option.
Pencils	25/– and 10 per cent. measurement	30/– and 10 per cent. measurement
Periodicals	25/– and 10 " "	30/– and 10 " "
Printers' Blankets	20/– and 10 " "	25/– and 10 " "
Photographic Apparatus	22/6 and 10 " "	27/6 and 10 " "
Pianos and Organs	20/– and 10 " "	22/6 and 10 " "
Plated Ware	25/– and 10 " "	30/– and 10 " "

Goods.	Southampton to New York.	London Warehouse to New York.
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Pickles	17/6 and 10 per cent. measurement	22/6 and 10 per cent. measurement
Provisions	25/– and 10 per cent. weight	35/– and 10 " weight
Plants and Trees	20/– and 10 per cent. measurement	25/– and 10 " measurement
Pictures	30/– and 10 " "	35/– and 10 " "
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Rugs	30/– and 10 per cent. measurement	35/– and 10 per cent. measurement
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Rubber Goods	25/– and 10 per cent. measurement	30/– and 10 per cent. measurement
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Saddlery & Leather Goods	25/– and 10 per cent. measurement	30/– and 10 per cent. measurement
Samples	25/– and 10 " "	30/– and 10 " "
36		
Seeds (Agricultural), In double bags	15/– and 10 " weight	22/6 and 10 " weight
Seeds (Agricultural), In single bags	17/6 and 10 " "	25/– and 10 " "
Seeds in cases	22/6 and 10 " measurement	27/6 and 10 " measurement
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Sewing Machines	25/– and 10 per cent.	30/– and 10 per cent.
	Weight or measurement, ship's option.	
Silks or Velvets	30/– and 10 per cent. measurement	35/– and 10 per cent. measurement
	or half per cent. and 10 per cent.	ad valorem, ship's option.
Silver Ware	One-half per cent. and 10 per cent. ad valorem.	
Skins: Furs, Sealskins, and other dressed skins in cases. Value to		

be declared before shipment.		
Skins: Dried, undressed, in bales, i. e., Calf, Sheep, Rabbit and Goat	25/– and 10 per cent. measurement or half per cent. and 10 per cent.	27/6 and 10 per cent. measurement ad valorem, ship's option.
Skins: other than those mentioned above undressed or dressed in bales or cases, Value not exceeding £100 per 40 cubic feet	27/6 and 10 per cent. weight	35/– and 10 per cent. weight
Skins: In bales or cases, Value over £100 per 40 cubic feet. Value to be declared before shipment	15/– and 10 per cent. meas'm't	20/– and 10 per cent. measurement
Soap, perfumed	25/– and 10 per cent. measurement or half per cent. and 10 per cent.	27/6 and 10 " " ad valorem, ship's option.
Spirits (except Gin)	17/6 and 10 per cent. measurement	22/6 and 10 per cent. measurement
Sponges	25/– and 10 " "	30/– and 10 " "
Stationery	12/6 net measurement	12/6 and 10 " "
Straw Goods	25/– and 10 per cent. measurement	30/– and 10 " "
Straw Plait and Straw Hats	12/6 and 10 " "	15/– and 10 " "
Straw Plait from Luton	10/– and 10 " "	12/6 and 10 " "
Tea	15/– and 10 " "	
Tobacco Pipes (brier)	15/– and 10 " "	20/– and 10 " "
Toys (harmless)	25/– and 10 " "	30/– and 10 " "
Typewriters	15/– and 10 " "	17/6 and 10 " "
	25/– and 10 " "	30/– and 10 " "
37	Weight or measurement, ship's option.	
Varnish	25/– and 10 per cent. measurement	30/– and 10 per cent. measurement
Wall Papers	17/6 and 10 " "	22/6 and 10 " "
Watch Parts	Half per cent. and 10 per cent. ad valorem.	

Goods.	Southampton to New York.	London Warehouse to New York.
Wearing apparel	30/– and 10 per cent. measurement	35/– and 10 per cent. measurement
Wines	25/– and 10 " "	30/– and 10 " "
Woodenware	20/– and 10 " "	22/6 and 10 " "
Woolens	30/– and 10 " "	35/– and 10 " "
Work boxes and Mirrors	30/– and 10 " "	

GOODS FOR REFRIGERATED STOWAGE.

	£.	S.	D		£.	S.	D.
7 lbs.	0	5	0	56 lbs.	1	10	0
14 lbs.	0	10	0	112 lbs.	2	2	0
28 lbs.	1	0	0				

Game—75/– per ton weight, with a minimum of £2.2.0.

Vegetables, Fruit, Cheese, etc.—40/– and 10 per cent. per 40 cubic feet, with a minimum of £2.2.0.

These refrigerator Rates are from Southampton only.

The freight on any package on any B/L or Parcel Ticket will be minimum of 2/6 Southampton to New York, or 3/6 London Warehouse to New York.

Weight, Cold Stowage, Automobiles, and ad Valorem Shipments must be specially arranged.

Southampton, December 31st, 1909.

(Sticker:) Goods to Canadian and United States Points Beyond New York—17/6 net per 40 cubic feet, Southampton to New York and 20/– and 10 per cent. per 40 cubic feet, London to New York.

38 United States District Court, Southern District of New York.

OGDEN M. REID, Libellant,
vs.
JAMES C. FARGO, as President of the American Express Company, Respondent,

and

INTERNATIONAL MERCANTILE MARINE COMPANY and T. HOGAN & SONS, Impleaded, Respondents.

The respondent impleaded, the International Mercantile Marine Company, answers the interrogatories propounded to it by the respondent, James C. Fargo, as president of the American Express Company, pursuant to the order of this Court entered December 26, 1912, as follows:

To the First Interrogatory: Yes, but said schedule was subject to change and the respondent was under no obligation to carry goods at the rates stated therein.

To the Second Interrogatory: Yes, substantially correct.

To the Third Interrogatory: Unable to state.

To the Fourth Interrogatory: Yes, so far as it was effective at any time.

To the Ninth Interrogatory: No, but it did receive a paper, copy of which is hereunto annexed, on or about December 30, 1910.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent Impleaded,
International Mercantile Marine Co.,
27 William Street, New York City.

39 **Specification for Foreign and Colonial Merchandise Free of Duty, or on which all Duties Have Been Paid.*

Port of Southampton. Ship's Name, Minnewaska. Gates, Master, for New York.

Date of Final Clearance of Ship, 24/12/1910.

*The Specification of Goods exported must be delivered to the proper Officers of Customs within six days from the time of the final clearance of the Ship, as required by the Customs Laws.

Marks.	Numbers.	Number and description of packages.	Quantity and description of foreign & colonial merchandise in accordance with the requirements of the official import list.	Country whence goods were consigned when imported.	Value (fob).	Final destination of the goods.
C M M Co. O. M. R. New York	185	1 case	Carriages Motor Car complete (Private effects) 60 cwt.	U.S.A.	800.00	New York

*The "F. O. B." or free on board value should be given.

I declare that the particulars set forth above are correctly stated.
AMERICAN EXPRESS CO. (*Agents*).
(Signed) H. T. BELL.

(Countersigned:) —— ——,
Officer of Customs.

Dated 30/12/1910.
Address—Canute Road.

40 STATE OF NEW YORK,
Southern District of New York, ss:

H. G. Phillips, being duly sworn, deposes and says that he is the treasurer of the International Mercantile Marine Company, one of the respondents impleaded herein; that he has read the foregoing answers to interrogatories propounded to the International Mercantile Marine Company by the respondent James C. Fargo, and that said answers are true to the best of his knowledge, information and belief; that the sources of his knowledge and information are documents in his possession and information received from the office of respondent, International Mercantile Marine Company, abroad; that the reason this verification is not made by the respondent, International Mercantile Marine Company, is that it is a corporation.

H. G. PHILLIPS, *Treas.*

Sworn to before me this 20th day of March, 1913.
CHAUNCEY I. CLARK,
Notary Public, Kings Co.

Cert. filed N. Y. Co.

41 United States District Court, Southern District of New York.

OGDEN M. REID
against
JAMES C. FARGO, &c., et al.

New York, March 25, 1913.

Before Hon. Van Vechten Veeder, Judge.

Appearances.

Messrs. Harrington, Bigham & Englar (Mr. Harrington and Mr. Houston), for the Libellant.
Messrs. Carter, Leydard & Milburn (Mr. Taylor), for James C. Fargo, &c.

Messrs. Burlingham, Montgomery & Beecher (Mr. Beecher) for the International Mercantile Marine Company:
Messrs. O'Brien, Boardman & Platt (Mr. Kerfoot), for T. Hogan & Sons.

Mr. Harrington states the allegations of the libel.
Mr. Harrington: I offer in evidence an agreed statement of facts.

Mr. Beecher: I object to the statement; the facts are agreed upon, but whether it is admissible is another question. I object to its admission because it relates to transactions incurred before the
42 delivery of the car to the International Mercantile Marine, or to transactions between other parties, as incompetent, irrelevant and immaterial, and res inter alios acta, not connected with this defendant.

Taken subject to objection.

The statement of facts is read to the court.

Mr. Harrington: I also offer in evidence all exhibits referred to therein.

Same objection by Mr. Beecher.

Same ruling and exception.

The statement of fact with exhibits is marked Exhibit 1.

Mr. Harrington: I also offer in evidence as an admission, an excerpt from the testimony of Mr. William Thomas Potts, the European agent of the American Express Company.

It is marked Exhibit 2.

Mr. Harrington: In addition to the other exhibits, I offer in evidence this paper, being the receipt given by the express company to libellant's agent at the time the car was actually delivered.

Mr. Beecher makes the same objection.

Taken subject to objection: exception.

It is marked Exhibit 3.

It is agreed that Mr. Ogden Reid, as libellant, is a resident of New York City.

Libellant Rests.

Mr. Taylor: I offer in evidence the direct testimony and the redirect testimony of Mr. William Thomas Potts, taken pursuant to notice.

Mr. Taylor reads the direct and redirect testimony to the court.

43 Mr. Beecher: I object as immaterial, irrelevant and incompetent, and not within the issues and not within the knowledge of this witness. This witness did not have any knowledge of this particular transaction.

The Court: Then I do not think you are harmed any. Read the deposition and read the objections and I will pass on them when we get through.

The deposition is read; the direct and redirect testimony are read to the court.

Mr. Taylor: I offer in evidence list of freight rates.

Mr. Beecher: Objected to as immaterial, irrelevant and incompetent.

Objection overruled; exception.

It is marked Exhibit A.

Mr. Taylor reads.

Mr. Taylor: I offer in evidence the original of these papers, Respondent Fargo's Exhibit 2 for Identification, Respondent Fargo's Exhibits 3 and 4 for Identification.

The Court: Attach them to the deposition.

Mr. Beecher reads the cross-examination to the court.

Mr. Harrington reads his cross-examination of the witness.

Mr. Taylor reads the redirect-examination.

The Court: I will take this, with the understanding that if I use any of what you are reading, I will specify what I use.

Mr. Taylor produces certain interrogatories propounded to the International Mercantile Marine.

The Court: They are a part of the record.

Mr. Taylor reads the first interrogatory.

Mr. Beecher: Objected to as incompetent, irrelevant and immaterial.

Mr. Taylor reads the second, third and fourth interrogatories.

44 Mr. Taylor: The fifth, sixth, seventh and eighth interrogatories were not answered.

Mr. Taylor reads the ninth interrogatory.

Mr. Taylor: That is my case, except as to the negligence of the Hogans.

James C. Fargo Rests.

Mr. Kerfoot: I do not think we should be held——

The Court: I think you will have to come forward with some evidence. It rests on you, by reason of the fact that the automobile fell in the water. Before I hear you, Mr. Kerfoot, it seems to me that Mr. Beecher comes in.

Mr. Beecher: It is admitted that the automobile was in charge of these people, and that they let it fall into the water.

Mr. Kerfoot: The only thing we have admitted is that we were unloading the car and it fell in the water.

The Court: You must excuse yourself somehow.

Mr. Kerfoot excepts.

The Court: I will hear from T. Hogan & Sons now.

Testimony for T. Hogan & Sons.

ANDREW NELSON, being duly sworn and examined as a witness for T. Hogan & Sons, testifies:

By Mr. Kerfoot:

Q. What is your business?

A. Foreman of the Atlantic Transport Line, Pier 58, North River. I am employed by T. Hogan & Sons.

45 Q. By whom were you employed in January 1911?

A. By T. Hogan & Sons.

Q. What was the connection of T. Hogan & Sons with the steamship line at that time?

A. Doing the stevedores' work for the Atlantic Transport Line.

Q. In the course of your duties with them, what were your particular duties?

A. I was foreman of one of the hatches.

Q. Did you have charge of the unloading of this vessel?

A. I did not have charge of the unloading; I was just a foreman of that hatch.

Q. I refer to the Minnewaska, which was unloaded January 5th, 1911. Did you have anything to do with the unloading of the automobile in question?

A. I did.

Q. Will you just tell us what you did?

A. The first thing I did was to go down in the ship's hold and have this automobile brought out to the hatch, and there we placed the sling around the automobile, which was hoisted from the ship's hold straight up very near the opening or hatchway, as we call it, and I also rode on this case from the ship's hold up to the deck. That was hoisted directly up and there it was conveyed across the ship's deck, and as it was to pass across the ship's deck and be lowered down from the ship's side to the shed, the sling parted and the case fell through the stringpiece.

Q. Who was there with you, if anybody?

A. Mr. Norton.

Q. What is his first name?

A. Jack or John.

Q. Did he furnish you with the sling?

A. No, sir, the storekeeper did.

Q. Who was he?

A. Mr. Anderson.

Q. Who does he work for?

Mr. Beecher: Objected to; it is only hearsay on his part.

46 A. No, it is not hearsay; the rope is given to T. Hogan & Sons by the Atlantic Transport Company, they furnish all the rope and gear which T. Hogan & Sons use.

Q. Have you known this man who gave you the rope, for some time?

A. Yes, sir.

Q. He was around there and in charge of the steamship's ropes before this?

A. Yes.

Q. And he furnished them with this rope?

A. Yes, sir.

Q. Did he give this sling to you or to someone else?

A. I sent one of the gang which I had in charge, down for these slings, which is used for that kind of work, for all heavy machinery, and automobiles.

Q. Who did you send?

A. I think that was Frank Bailey, he was the man I generally send down for the slings.

Q. Did you have any slings of your own?

A. Our slings are the Atlantic Transport's slings; I didn't get them.

Q. Did you have any slings of Hogan's?

A. No, sir.

Q. How many years has it been customary for the steamship to furnish you with a sling?

A. That was long before my time, and I have been there for about 14 years.

Q. Describe this sling?

A. Well, as near as I can describe it, it is what we call manila rope, and it is joined together, what we call a splice in it, that forms the sling; and the rope is furnished by the company, and of course it looked like good rope.

Q. What size rope was that?

A. About three and three-quarters inch.

Q. Was that medium size or large size?

A. That is about as large a sized rope as we use.

47 Q. Do you have any larger size rope there?

A. Not as I know of.

Q. How long was the rope?

A. That piece of rope, I should think, was about, if you take the splice out, it would be about 60 feet; joined it would make about half of that; about 30 feet.

Q. It was an endless rope?

A. It was an endless rope, on account of the splicing.

Q. How many automobiles have you unloaded, of exactly that same kind?

A. I should practically say about three to four a week unloading, and about from 50 to 60 loading each week.

Q. Did you ever use any heavier rope than this?

A. No, sir.

Q. The same kind of rope always?

A. The same kind of rope always.

Q. Have you ever had any accident before this one?

A. No, sir.

Q. Have you ever had a rope like this, part before?

A. No, sir.

Q. Was any inspection made of this rope on this particular occasion before you started to use it?

A. Only what I did myself, what I looked for myself.

Q. Was it inspected by the storekeeper?

Objected to.

Q. Whom did you send to for this rope?

A. Probably it was Frank Bailey that I sent.

Q. Whom did you send to?

A. To the storekeeper on the pier.

Q. Do you know whether the storekeeper inspected the rope or not?

A. Well, that is his duty, as near as I can say.

On motion, the answer is stricken out.

Q. Have you at any time seen the storekeeper inspecting ropes; not this particular one?

48 Mr. Taylor: Objected to.

The Court: Why should you go into that?

Q. Did you make any inspection of the rope yourself?

A. I did.

Q. What did you do?

A. Well, we handled the sling to pass it around this automobile, and it is necessary to handle the sling when you are passing it around the automobile, and you see it; and it seemed perfectly safe to use; there was no part of it which was parted or stranded, as we call it, on the sling.

Q. How long have you been handling ropes of that size; all the fourteen years?

A. About fourteen or fifteen years.

Q. Do you know a defect in a rope when you see it?

A. Yes, sir.

Q. Was there anything at all on this rope to indicate that there was anything wrong with it?

A. No, sir.

Q. Was it an old or a new rope?

A. It was a good rope; it wasn't exactly brand new, but it was in good condition.

Q. Any cuts.

A. No cuts whatever, not a break in any part of it.

Q. Did any part look weaker than any other part?

A. No, sir.

Q. Did any part look different from the ropes that you have used for the whole fourteen years?

A. No, sir.

Q. Did you start that box with the machine in it to go down in the hold?

A. As soon as I got the weight on it, I got on top of the automobile myself and came up on top of it from the lower hold, right up to the deck.

Q. What hold was the machine in?

A. No. 2 hatch.

49 Q. How far down?

A. I should think about forty feet.

Q. Did you ride the forty feet?

A. I rode up the forty feet.

Q. At that time was the box on this one rope?

A. The box was on this one rope, on the purchase, the block and fall had hold that was hoisting it; I might have gone down with it.

Q. Were you careful before you got on that thing, to see that there were no defects in it?

Objected to.

The Court: He has covered that.

A. I certainly was.

Q. Will you tell how that was fastened around the box? (Producing paper to witness.) Is this a fair representaton of how it was fastened around, or is it not?

A. Yes, that is a good cut.

Q. Put the drawing aside, and answer this question. How was the sling put around the case?

A. It was brought directly around the case on the center underneath; then one part was passed through the other to jamb it.

Q. Was it secured in that position in any way?

A. Then it was secured around the back by another rope, to keep this rope from sliding off.

Q. So it was doubled?

A. It was doubled; two parts spliced together.

Q. Is that drawing a fair representation of the way it was?

A. Yes, sir, that is a fair representation.

The drawing is offered in evidence.

It is marked Exhibit B.

Q. Is that the same way that you have always been in the habit of fastening the slings around cases of that size.

A. Yes, sir.

50 By the Court:

Q. Where did it break?

A. I can't tell where it broke; nobody can tell where it broke.

By Mr. Kerfoot:

Q. Was there anything unusual about the way this shipment was handled?

Mr. Taylor: Objected to. Let him state how it was actually handled.

Q. State how it was handled from the time it left the bottom of the hold until it dropped.

A. I have already explained that.

Q. You got it to the top of the deck, and in what manner did you transfer it across?

A. It was conveyed by another fall; there was a burdon fall, and here is the hold; as soon as they came up the right height, it was conveyed by another fall across the ship's deck and when it came on the other side, it was lowered down the ship's deck and the dock's side, lowered down.

Q. By a tackle somewhat as shown in this drawing?

A. Similar to that, yes, sir.

The drawing is offered in evdence.

It is marked Exhibit C.

Q. Will you explain just what kind of tackle you have had to get that automobile out of there.

A. Well, I described the ship's sling as being a piece of rope joined together, or spliced, calling it an endless rope, 8 or 9 fathoms of the sling being double; then the tackle is a fall rove through one block and is passed down through another block in the bight and rove up; that is doubling up a fall; that is put in a block in the center; there are two parts. That doubling up equalizes it, and you can take twice

the amount of weight that you can with one part; then we
51 put that block in there to double it up; it travels half as fast and takes twice the weight that an ordinary rope does.

Q. That is the tackle with which you lifted it up. Now describe the other tackle.

A. Yes, sir; the other fall is rigged exactly the same way, but that is to retain the weight when it is — it is this fall that takes out this machine, and you pass it down from the ship on to the dock; it is rigged the same way. It is doubled up the same way; but one is to convey the case from the ship's deck across the deck and lower it down over the side; the up and down fall loses all the weight of the case when it is being lowered over the side.

Mr. Kerfoot: I will withdraw Exhibit C; it seems to cause confusion.

Q. Was there anything broken after this accident, except the one sling?

A. No, sir.

Q. How about the rope you had tied around the other way on the box; was that broken?

A. No, sir.

Q. Was any of the tackle broken?

A. No, sir.

Q. Are you able to say what was the sole cause of the dropping of the machine?

Mr. Beecher: Objected to.

The Court: The sling broke.

Q. Was there anything that you saw after the accident——

By the Court:

Q. Do you know why it broke?

A. Yes, sir, I know why it broke. It broke because that rope sling parted.

Q. Do you make any distinction between parting and breaking?

A. That is just what we term parting; it is only breaking.

52 Q. How do you know? When I asked you where it broke, you said nobody knew.

A. It would be impossible to tell just where it broke, because in this sling there is a bight—one part of the rope you put the hook in there, but the weight of that case parting, the sling flew; that is to say, the sling flew right off the case.

Q. Do you know that any part of the sling was actually broken, of your own knowledge?

A. Yes, sir, I saw it.

Q. Where did it break?

A. I couldn't say very well what part it was; it would be a hard matter for me to distinguish where it was broken.

By Mr. Kerfoot:

Q. Did you examine the rope after the break?

A. Yes, sir, a part of that rope had parted; just broken off.
Q. Was it a break such as an ordinary break?
A. An ordinary break, yes, the customary breaking of a rope.
Q. Do you know anything about where the rope is?
A. No, sir, I do not.

By the Court:

Q. Where did you leave it? Where was it when you saw it last?
A. I believe the steamship company took care of the rope.
Q. Do you know that they did?
A. Yes, sir, at the time; they took the rope in their office.

By Mr. Kerfoot:

Q. Have you seen it since?
A. No, sir, the steamship company took care of that rope.
Q. Had you carried from time to time during your fourteen years prior to this accident, shipments of as much weight as this one, on a similar tackle?
A. Yes, sir.
53 Q. Have you from time to time carried shipments a good deal heavier than this one?
A. Yes.
Q. Did you ever have any heavier sling than this was?
A. No, sir, just the same sized sling; 3 and ¾ inch rope.
Q. What did you see?
A. I saw then that the automobile went to the bottom, down in the mud.
Q. Was that raised?
A. Yes, sir; the Merritt & Chapman people picked it out of the mud.

By the Court:

Q. Was it a crate or a box?
A. Well, it was boxed.
Q. Could you see what was in the box?
A. No, sir, the box was all off; I should think it was about 30 feet of water there that the automobile was in.
Q. I mean when you hoisted it up out of the hatch, could you see that it was an automobile?
A. No, sir, you could not see; but we knew it was an automobile; it was solidly packed.
Q. How did you know it was an automobile?
A. From the instructions we got from the steamship company.
Q. Was the weight marked on it?
A. Yes, sir.

By Mr. Kerfoot:

Q. Do you know what weight that tackle and sling would carry?
A. That one part of rope—that is to say, one single part of that rope, what they call the standard break, is about five tons for one

part, and as to the double part, I suppose it would stand about twice that.

Q. Do you know what this shipment weighed?

A. Oh, in the neighborhood of 5,300 pounds.

Q. Where did you get your information to that effect?

A. From the steamship company.

Q. Was it given to you before or after you started to bring the machine up out of the hold?

A. Before.

54 Cross-examination by Mr. Beecher:

Q. You said you sent some man to get the sling.

A. I did.

Q. You think it was Bailey?

A. Yes.

Q. You told him to bring back a sling, did you?

A. I told him to bring back the slings, yes, sir.

Q. Did you tell him what size sling you wanted?

A. No, sir.

Q. You left it to his judgment?

A. To the storekeeper's.

Q. What did you tell Bailey?

A. I told Bailey to go down to the storeroom and get the slings to take out the machinery and automobiles with.

Q. And he came back with this sling you have described?

A. With these slings, yes, sir.

Cross-examination by Mr. Taylor:

Q. You saw this sling break?

A. I don't know——

Q. I understood you to say you saw it break.

A. No, sir, I did not remark it.

Q. Where were you standing at the time it broke?

A. I was going down to the ship's hold at the time that parted.

Q. Then you were not working at it?

A. No, I was not.

Q. When you examined this sling, where were you?

A. Down in the ship's hold.

Q. Forty feet from the ship's deck?

A. Forty feet from the ship's deck, yes, sir.

Q. What light did you have?

A. The light we have got out here; the same light as we have got outside here.

Q. But you were in the bottom of the hold, weren't you?

A. It is just as daylight down there as it is here.

Q. How much time did you spend on the examination of that rope?

55 A. That is a hard matter to tell; I passed it through my hands, which is necessary to pass it around the case; the whole sling has got to be handled to do that.

Q. Did you make any special examination of it other than such inspection as was necessary in putting it around the box?

A. No, sir, I didn't see that it was necessary.

Q. You say that this was a three and three-quarter inch rope?

A. Yes, sir, a three and three-quarter inch rope.

Q. Do you mean in diameter, or in circumference?

A. In circumference.

Q. How thick would that rope be?

A. Oh, I should judge about—you can judge for yourself.

Q. About an inch and a quarter?

A. No, it couldn't be that; a little over an inch; about an inch and a sixteenth in diameter.

Q. Do you say that a rope an inch in diameter is the largest that is ever used to bring up machinery?

A. Yes, sir, by us, for our work, yes, sir.

Q. Have you ever seen lifted five tons by such a rope?

A. I have.

Q. When was that?

A. By the Merritt & Chapman people.

Q. In wrecking?

A. Yes, sir.

Q. But aside from that you have never seen five tons lifted by such a rope?

A. No, sir.

Q. You sometimes have shipments of cargo that are very much heavier than five tons?

A. Yes, sir.

Q. How do you handle them?

A. Merritt & Chapman handle them.

Q. Oh, Hogan & Sons don't handle them?

A. No, sir.

Q. Then they don't handle a weight that is up to say five tons?

A. Two and a half tons is our limit.

Q. Then this automobile was up to your limit?

A. A little below our limit.

56 Q. Below your limit, assuming that it weighed five tons?

A. I say two and a half tons is our limit and there is 2,240 pounds to English weight, and 5,600 pounds would be two and a half.

Q. If this automobile weighed 6,720 pounds, it was above your limit, wasn't it.

A. It was, sir.

Q. In putting this sling around the automobile case, did you put anything under the edges to keep the rope away from the edges of the case?

A. No, sir, it is all wooden battens all the way around; it don't necessitate putting anything around; there is no iron on it or anything like that; it is all wood.

Q. But it is a square edge?

A. Well, you can call it a square edge if you like; but there is nothing that is cut on them; it is all smooth.

Q. As a matter of fact, you didn't put any blocks under those square edges?

A. No, sir.

Q. You have said that this rope had been used. Can you form any idea as to how old it was?

A. That is something I can't tell; it wasn't very old, because the newness of the rope was there and there was a little dirt on it, like a little dirt from the pier, perhaps; of course, the rope was good, though as good as a new rope.

Q. You examined it after it broke?

A. Yes, sir.

Q. What sort of a break was it; was it broken straight through or were the strands broken in some places?

A. What we call stranded; some more than others.

Q. A break that extended along a large part of the rope?

A. Well, the three parts would be like this (illustrating); one would break there, and one there, and one a little further on, so it wasn't a direct cut.

Q. Those strands broke at different places?

A. Yes, sir.

Q. When this automobile reached the deck, did it rest on the deck?

A. No, sir.

57 Q. Then it was lifted up above the deck?

A. Yes, sir.

Q. How did you get off?

A. As soon as we came to the coamings of the hatch, there is a little extension above the deck that we call the coamings, I should think about three feet; then when we brought it that high I gave him a hand to put the other hook on, as I told you before, the burdon fall, which was necessary when you came up on the ship's deck to convey this across the deck, I stayed there to give the man a chance to put the hook on this case, and then I got off.

Q. Was that hook put on the tackle or on the sling?

A. On the sling, sir.

Q. Who gave the orders for the starting of the winches to handle this?

A. A gentleman by the name of Frank Norton.

Q. You didn't give the orders yourself?

A. No, sir.

Q. Then the winch that was lifting the automobile up stopped there to go above the deck?

A. When it came to the level of the deck, then we had to put another fall, the burdon fall on it, and in order that when that case came clear of the hatch the other fall could convey it to bring it across the deck.

Q. Was there a boom that swung in to the side?

A. The boom don't swing; it is stationary; and there is a gallows on top; it is stationary. That is where the burdon fall is fastened to, the boom; the up and down boom travels up and down is stationary; that don't move, but the tackle is rigid, and that moves.

Q. So the tackle instead of remaining upright is swung sidewise?
A. Yes, the burdon fall brings the up and down out, you see.
Q. Then, when you had pulled it over the ship's side, how was the lowering down?

A. It was lowered by the burdon fall; there is one fall—
58 the up and down fall results from the controlling of the automobile after it comes over the ship's side.

Q. Does the up and down fall stay attach to it?
A. No, sir, you unhook it at the ship's deck, and that goes down in the hold and gets ready to get another automobile out of the hatch.
Q. This had been unhooked—the up and down tackle had been unhooked at the time?
A. No, it wasn't unhooked at the time.
Q. Do you know whether they had started lowering it?
A. I don't think they had.
Q. They were still pulling sideways?
A. Yes, at the time, they were still pulling sideways.
Q. But it had gotten over the side of the ship?
A. It had just about cleared the ship's side, yes, sir.
Q. Who was actually operating the winches?
A. Do you mean operating that winch, or the man that was giving the orders?
Q. The man that was giving the orders was Mr. Norton?
A. Yes.
Q. Who actually operated the winches? One of the ship's men?
A. No, sir, an employee of T. Hogan.

Redirect examination by Mr. Kerfoot:

Q. Is it customary to place any padding or boards under the corners of a case of this size?
A. No, sir.
Q. Was this sling placed in that respect exactly as is customary?
A. Yes, sir.
Q. When the weights were given to you of these cases, where did you get them?
A. I generally get them from Mr. Norton, and he gets them from the Atlantic Transport office, on the pier, the superintendent on the pier gives them to him.

59 Q. You don't weigh any of them yourself, do you?
A. No, sir.

Q. Have you any means of finding out the weight of them, except the weights that are given you?
A. No, sir, we only judge what the steamship companies give us.
Q. In view of your experience of 14 years, I ask you whether the method in which this particular shipment was handled was negligent, or whether it was done in the way it is customarily done by careful men doing the same kind of business?

Mr. Taylor: Objected to as rather foreclosing the decision of the court.

The Court: He can testify to the facts. He says it is the usual and customary way of unloading.

Mr. Taylor: The first part of the question is objectionable.

By the Court:

Q. You say the ship furnished all these slings?
A. Yes, sir; that is to say, the Atlantic Transport furnished them; not the ship, but the company.
Q. Where did you get your instructions to get your slings from the storekeeper?
A. Well, it has been my practice since I have been there, to send to the storeroom and get my slings; they furnish all the ship gear.
Q. You are answering everything but what I asked you. Who instructed you to go to the ship's storekeeper to get the slings?
A. Well, there is no one instructed me, but it is a regular thing for us to do it.
Q. It is a customary thing for you to do it?
A. Sure, it is a customary rule for us to do it, yes, sir.
60 Q. That has been the practice with this ship?
A. Yes, sir.
Q. And this company?
A. Ever since I have been there, and prior to my employment there.

By Mr. Kerfoot:

Q. The same party which gave you the weights of the articles to be moved out of the hold furnished you with the ropes?

Mr. Beecher: Objected to on the ground that he has not testified that the company gave him the weights.

Q. Did the company give you the weights or not?
A. I testified that.

Mr. Beecher: You testified a few moments ago that one of Mr. Norton's employes gave you the weights.
The Witness: I also said that Mr. Norton gave me the papers which he got from the company.

By Mr. Beecher:

Q. You don't know where he got them, do you?
A. I do.
Q. Did you go with him?
A. Yes, sir.
Q. You went with him to the company?
A. Yes, sir.
Q. And the company handed up the papers?
A. Yes, sir.
Q. Where did you go?
A. To Mr. Evans' office, the superintendent's office.
Q. How did you happen to go with him to get the papers?
A. Because I always went with him to find out what was the heavy weights to put off; and we generally went in Mr. Evans' office and got the papers together.

61 Q. Then Mr. Norton at once handed the papers over to you?
A. Yes, sir, he generally gets two instead of one.
Q. Do you remember particularly that you went along on this occasion?
A. Yes, sir.
Q. And there was a paper handed you?
A. Yes.
Q. And that paper had a weight on it?
A. It had a lot of weights.
Q. The weight of this automobile as given was what, on the paper?
A. I think it was 5,300 pounds.
Q. That is your recollection after two years?
A. Yes, sir.

By Mr. Kerfoot:

Q. Did you get your weights and the rope from the same company?
A. Yes, sir.
Q. Did the company give you any heavier sling than the one you used on this particular occasion?
A. No, sir.

By Mr. Beecher:

Q. You testified that you got the weights from the company and you are now testifying that you got the rope from the company. You didn't get the rope from the company at all, did you?
A. Yes, sir.
Q. Didn't you say you got it from one Bailey?
A. Well Bailey got it from the company.
Q. You went with Bailey also did you?
A. No, sir, I did not.
Q. You don't know where he went?
A. I do.
Q. Did you go with him?
A. No, sir.
Q. Then you don't know where he got the rope?
A. That is the only place he could get them.
Q. That is the only reason you say he got them from the company, because you say that is the only place he could get them?
A. Yes, sir.

62 The Court: Also from the fact that those were his instructions, to go to the storeroom and get them from the storekeeper.
Mr. Beecher: Yes, but he is constantly saying that he knows thus and so, when he doesn't know of his own knowledge.

AIDEN KENNY, being duly sworn and examined as a witness for T. Hogan & Sons, testifies:

By Mr. Kerfoot:

Q. Are you a longshoreman or stevedore?
A. I am a stevedore.
Q. For what concern do you work now?
A. The Cunard Steamship Company.
Q. In January, 1911, by whom were you employed?
A. By T. Hogan & Sons.
Q. Do you know anything of your own knowledge about the hoisting of the Reid automobile out of the steamer Minnewaska?
A. Not anything more than I saw it falling.
Q. What did you see?
A. I was coming down the dock and I heard a crash and went to investigate it and I found that there was an automobile in the water.
Q. What were your duties with T. Hogan & Sons at that time?
A. I was assisting Mr. John Norton.
Q. You didn't have anything to do with this particular shipment up to the time it dropped in the water?
A. No.
Q. Did you see it after that?
A. Well, I stood there and we saw that it got up, I saw some other things floating in the river when the automobile came up; an English perambulator, baby-carriage we call them, came out of
63 the automobile case, and several other small articles that I disremember.
Q. Did you examine the tackle that was used?
A. No, I didn't examine the tackle.
Q. Did you examine the sling?
A. I did not.
Q. Do you know the kind of a sling that was used?
A. Well, the kind of a sling that does be used is three and three-quarter inch ropes.
Q. Have you seen that kind of a sling used for some time there, or not?
A. Mostly that is the sling; that is the slings that they generally swing up automobiles with.
Q. How long were you employed by T. Hogan & Sons in connection with the unloading of these steamers?
A. About 18 or 19 years, or more.
Q. Have you during all that time seen the unloading of automobiles from steamers?
A. Not during all that time; I was in other places off and on; but working for Hogan at the time, I would go to the Atlantic Transport Line when I wouldn't be engaged in some place else.
Q. Have you seen a great many automobiles unloaded, or not?
A. Quite a few.
Q. Have you seen this kind of tackle used in unloading them, or other kinds?
A. I have seen this kind of tackle.

Q. Have you seen many men unloading with this kind of tackle
A. Yes, quite a few.
Q. Did you ever know of any accident by the breaking of a slin of this sort in unloading an automobile before?
A. No, not before.
Q. Can you state from your experience in connection with th kind of work, whether a rope of that sort, if it was sound, would b adequate for loading an automobile of that weight?
A. Well, some people would lift more and other people wouldn lift anything more than what would be—but from my experienc I would lift quite a lot more.
64 Q. Do you know of your own knowledge what a rope o that size will lift?
A. Well, I wouldn't be afraid of lifting four or five tons mysel in my experience.
Q. What experience have you had?
A. Quite a little experience, on and off, in different places.
Q. Have you lifted things of that weight with slings of that siz and that kind?
A. Yes, sir, and I have seen the rope tested with that weight, an more.
Q. What would a rope of that size and in good condition lift, ac cording to the experience you have had and from the tests you hav seen made?

Mr. Taylor: Objected to.
The Court: I think you have covered that.

A. I think that rope would be good for four and a half tons.
Q. Do you know how this machine was packed in the case?
A. I didn't examine it, and I did not examine the case afterwards
Q. Can you tell whether the automobile was loose in the case, o fastened in?
A. I couldn't say, but when we get a weight of an automobile case we rig up according; if we get such a case we rig up according t that, and a little more.

No cross-examination.

JOHN NORTON, being duly sworn and examined as a witness for T Hogan & Sons, testifies:

By Mr. Kerfoot:

Q. Were you employed by T. Hogan & Sons at the time of thi accident?
A. Yes.
Q. What was your capacity?
A. Foreman in charge of the ship.
65 Q. Did you see the accident?
A. No, sir.
Q. Did you see the machine and the tackle either before or afte the accident?

A. After.
Q. What did you see?
A. I saw the machine when it was taken up out of the river, and I got the rope on it and pulled it on the deck.
Q. Did you see the sling?
A. Yes.
Q. Did you examine it carefully?
A. Yes, sir.
Q. What did you find?
A. I found the sling was carried away, parted; there were three different lengths to the strands; they were all of different lengths.
Q. Was the sling cut or frayed, or broken?
A. No, just the usual part; the sling, when it is cut, is usually cut square; but when it parts, it parts different lengths; one strand will probably go before the other, and will stretch out the length of the next strand; it doesn't part square.
Q. Have you seen machines of this sort unloaded from steamers for a long time?
A. Yes, sir.
Q. Have you unloaded them yourself?
A. Yes, sir.
Q. And supervised the unloading of them before for T. Hogan & Sons?
A. Yes, sir.
Q. About how many machines would you unload in a month?
A. Some months would be heavier than others, when the tourists are running.
Q. Well, approximately?
A. I should say ten or twelve.
Q. Do you load them also?
A. Yes, sir.
Q. Have you handled machines of this weight, frequently?
A. Yes, sir.
Q. What kind of tackle have you used to handle them with?
A. Double falls; three and three-quarter inch rope, and three and three-quarter inch slings.
Q. Was the rope used for a sling in this case the same as you had always used heretofore?
A. Yes, sir.
66 Q. You never had any accident with them?
A. No, sir.

By the Court:

Q. And the method of unloading was the same?
A. The method of unloading was the same.

By Mr. Kerfoot:

Q. Was there anything at all about the handling of this ship, so far as you know, that was different from——

Mr. Taylor: Objected to.
Question withdrawn.

Q. Was there anything that you could see about the tackle or the ropes, aside from this one break, that was different from what you would be in the habit of seeing for similar purposes?
A. No, sir.
Q. Where did this rope come from, the sling?
A. I presume it came from the storeroom.
Q. Did T. Hogan & Sons have any slings of their own?
A. No, sir.
Q. Where did they usually get slings?
A. From the storekeeper.
Q. Do they always get them there?
A. Yes, sir.
Q. Do you know where this rope came from; where was it when you first saw it?
A. Lying on the stringpiece.
Q. It had already broken off?
A. Yes, sir.
Q. You had nothing to do with getting the rope or supervising the hoisting of the machine?
A. No, sir, I didn't happen to be there.

Cross-examination by Mr. Beecher:

Q. Do you know who pays the storekeeper's wages?
A. I believe he is paid jointly.
Q. By T. Hogan & Sons and the company?
A. By T. Hogan & Sons and the steamship company.

67 Cross-examination by Mr. Taylor:

Q. Did you see this case containing the automobile while it was in the hold?
A. No, sir.
Q. Did you ever see it before it went overboard?
A. Not to my knowledge.
Q. Did you examine the case afterwards?
A. There was no case to examine, no; only splinters.
Q. You examined the sling, however, when it broke?
A. Yes, sir.
Q. And you have said that that broke in three places, different strands breaking?
A. Yes, not in different places; in three lengths; one a couple of inches longer than another.
Q. Did you examine the strands where the break had taken place?
A. I just looked at the ends.
Q. Did you discover any defect there in explanation of the break?
A. No, I did not.
Q. Did you see any evidence of cutting?
A. No.

Redirect-examination by Mr. Kerfoot:

Q. Who was in charge for T. Hogan & Sons?
A. That was the superintendent, Mr. Nelson.
Q. What Nelson is that?
A. Mr. Nelson, Sr.
Q. Did you have anything to do with the storekeeper, giving him any orders?
A. If I wanted anything; he was under my orders.
Q. Did he do anything other than simply furnish you with such things as you asked for?
A. That is all.
Q. Did he have any other duties that you know of?
A. He spliced all our slings and gave us all our gear and our chains and blocks.
Q. What portion of the chains and blocks belonged to T. Hogan, and what belonged to the steamship company?
A. Only the chains, slings and blocks and trucks belonged to T. Hogan.
68 Q. Is that all the stuff that is used in that business?
A. The rollers and crow bars; and such things as that.
Q. You understand that the storekeeper is paid for taking care of those things between the times they are being used?

Objected to.

Q. Do you know anything about what the storekeeper is paid by T. Hogan, the proportion of his wages?
A. No, I do not.
Q. Do you know of any special duties that he performs for Hogan & Company, in addition to taking care of the tackle and blocks between the times they are being used?

Mr. Beecher: Objected to.
The Court: If he knows, he can state.
Exception.

Q. Do you know of any services that this storekeeper performs for T. Hogan & Sons?
A. He looks out for the gear; what gear we have on the pier; blocks, crow bars, roller trucks, coal trucks.
Q. Is that all?
A. That is all.

FRANK NORTON, being duly sworn and examined as a witness for T. Hogan & Sons, testifies:

By Mr. Kerfoot:

Q. In January, 1911, you were employed by T. Hogan & Sons?
A. Yes, sir.
Q. What to do?
A. Gangway man.
Q. Did you have anything to do with the unloading of the Minnewaska on the 5th?

A. Yes, sir.

69 Q. Did you have anything to do with the unloading of this automobile?

A. Yes, sir.

Q. What did you do?

A. Hooked on the automobile and took it over the rail, and that was the last I saw of mister automobile, and the sling carried away.

Q. Where was it when you first saw it?

A. Taken out of the hatch.

Q. It was already up?

A. It was coming up the hatch.

Q. What were your duties with Hogan?

A. Giving orders to the men at the winches.

Q. You mean you gave a signal to the men to stop and start and slow down and speed up?

A. Yes, sir.

Q. Have you been unloading automobiles of this sort for a long time?

A. Yes, sir.

Q. Was there anything different in the way this one was handled, from the way you ordinarily handle automobiles?

Mr. Taylor: Objected to; let him state what was done.

The Court: I will take it subject to objection.

Exception.

A. No, sir.

Q. Did you examine the sling after it was broken, or before it broke?

A. No, sir.

Q. Do you know anything about the weight of this machine?

A. No, sir, I do not.

Cross-examination by Mr. Taylor:

Q. Where were you?

A. On deck.

Q. On the deck of the Minnewaska?

A. Yes, sir.

Q. Could you see over the side?

A. Yes, sir.

70 Q. You were standing close to the rail?

A. Yes, sir.

Q. Where was the man to whom you were giving orders?

A. Right abreast of the hatch.

Q. Was he on the dock?

A. No, sir, on the deck of the ship.

Q. What order did you give to him; to hook on?

A. I gave all the signals.

Q. What orders did you give?

A. As soon as I hooked on, I told him to go ahead, and we would take it over the side.

Q. You hooked on; did you do the hooking on yourself?

A. No, I helped to hook the hooks in; it took two to hook the hook in.
Q. Where was the man who started the winch?
A. Standing right by it.
Q. That winch was on board?
A. On board the steamer.

Redirect examination by Mr. Kerfoot:

Q. Were there any jerks?
A. No, sir.
Q. Or any interruption of any sort in the handling of this case?
A. No, sir.
Q. Did it move gradually all the time?
A. It moved gradually.

Recross-examination by Mr. Taylor:

Q. How far over the rail did it get before it broke?
A. It just got clear of the rail.
Q. Was the original tackle loose at that time, the tackle that pulled it up?
A. It was all tied together; one was lowering away for the other.
Q. They were pulling different ways?
A. Yes, sir, one slacks away for the other.
Q. Neither one was just slack?
A. Neither one was slack, no sir.

71 By Mr. Beecher:

Q. There was a steady pull till the automobile dropped?
A. Yes, sir.

By Mr. Taylor:

Q. You mean it seemed to you to be a steady pull?

The Court: That is all.
Mr. Kerfoot: I have another witness who will not be here till 2 o'clock.
The Court: Well, you can go on with the testimony if there is any, Mr. Beecher, and let the other witness go on at 2 o'clock.

Testimony for the International Mercantile Marine.

ALFRED JOHN EVANS, being duly sworn and examined as a witness for the International Mercantile Marine, testifies:

By Mr. Beecher:

Q. You were assistant superintendent at the pier at the time of this accident?
A. Yes, sir.
Q. Did you see the sling that parted after the accident?
A. I had the sling in my office; I was down the pier and had the sling removed to my own office.

Q. You didn't actually see the accident?
A. No, sir.
Q. Do you know what has become of the sling?
A. It is lost.
72 Q. You can't find it?
A. I have tried to find it, but there was a change of the superintendents at the time and I lost the sling and can't find it.
Q. Did you notice how it was parted, when you examined it after the accident?
A. Well, a great deal shorter break than usual when a rope parts; I suppose they are probably eight inches in length; as a rule when a rope parts she will part by within two feet at the outside, but that might be due to the pressure of the rope up against the case, and not allowing the rope to unravel.
Q. Do you know what arrangement there was as to the storekeeper being paid?
A. No, sir; it has been usually $3 a week by the Atlantic Transport Line to the storekeeper.
Q. And what by Hogan & Sons?
A. I really couldn't tell you.
Q. Well, whatever else he got for his services, he got from Hogan & Sons?
A. Yes, sir.

Cross-examination by Mr. Kerfoot:

Q. Could that kind of a break have been caused by a defect in the rope, which was not discovered?
A. Well, I should say no; it looked in good condition.
Q. If it had broken from too much weight, do you think it would have broken in some other form?
A. Well, as a rule if a rope breaks she will generally unravel two to three feet; one strand will be first and unravel two to three feet; that was my experience; but that rope might have broken, and being pressed against the case, might not have unraveled.

International Mercantile Marine Company rests.

Recess till 2 P. M.

73 Met pursuant to adjournment, at 2 P. M.

ANDREW NELSON, being duly sworn and examined as a witness for T. Hogan & Sons, testifies:

By Mr. Kerfoot:

Q. What were your duties in January, 1911?
A. Superintendent for T. Hogan & Sons, in Philadelphia.
Q. Did you have charge of the work of T. Hogan & Sons at the pier at which the Minnewaska was being unloaded at that time?
A. Yes, sir.
Q. Was there anybody over you there, or were you the man in charge?

A. I was in charge of the stevedore work, to a certain extent; the superintendent on the pier was also in charge; he was still over me.

Q. Will you tell me what was furnished in the way of equipment for unloading the vessel, by T. Hogan & Sons?

A. Well, all the gear was furnished by T. Hogan & Sons outside of the rope, lights and tents; they were furnished by the steamship company.

Q. What is a tent?

A. They are a kind of a tent which sets the same as an umbrella on the hatches when it is raining, to keep the water from going down to destroy the cargo; it is just the same as umbrellas over the hatches. We keep the hatches covered when it rains.

Q. Did you have charge of purchasing the equipment for Hogans?

A. Yes, sir.

Q. And you are familiar with what it was?

A. Yes, sir.

Q. Did you have at that time, any ropes at all?

A. No ropes whatever on the pier.

Q. Did you employ a storekeeper?

A. Yes, sir, one half; we paid about half and the company pays about the other half; we pay them $15 a week, any-
74 way; I don't really know what the company pays them, whether they pay him $3 or $6, I am not sure.

Q. So far as your company is concerned, you pay $15 a week.

A. Yes, sir.

Q. Did you employ him?

A. We employed him, of course, for our company.

Q. You employed him for Hogan & Company?

A. Yes.

Q. Can you state what his duties were in connection with your tackle?

A. His duty was to have the gear in order for us when the steamer came in, so we could go and get the steamer rigged up as soon as possible; so we would have to put our men on to go to work on the chains and block and tackle, etcetera.

Q. Did you send him in for the rope, when you wanted it?

A. I sent him in for all ropes; he has the entire charge of all the ropes and all the company's gear and all our gear.

Q. Did you have any supervision over him at all, in reference to the ropes, or were you compelled to take whatever he handed you?

Mr. Taylor: Objected to.

The Court: Leave out the word "compelled."

Q. Did you take whatever he gave you?

A. We took whatever he gave us.

Cross-examination by Mr. Beecher:

Q. If he gave you a bad piece of rope, you wouldn't take it, would you?

A. Well, he was not supposed to give us a bad piece of rope.

Q. (Repeated.) If he gave you a bad piece of rope, you wouldn't take it, would you?

A. Well, if we could see it actually had a defect, I don't
75 think we would take it.

Q. You didn't act on his judgment in determining what sort of a rope you should use, did you?

A. Yes, sir, because he is a man of good experience.

Q. He wouldn't come to the hold of the steamer and look at the cases, would he?

A. No, that wouldn't be his duty.

Q. That would be your duty?

A. That would be my duty, yes.

Q. And you would send to him to get the sort of rope that you thought should be used for those cases?

A. Yes, sir.

Redirect examination by Mr. Kerfoot:

Q. Did you tell him to send up a special sized rope or did you tell him to send a rope to hoist machinery

A. When we had an automobile or a case of that kind, we would send down for a piece of rope to take out heavy pieces; we have suitable rope for that.

Q. Was it his duty to pick out the ropes to give you?

A. We asked for machinery or automobile slings.

Q. Do you know what kind of slings it was customary to use for automobiles?

A. Yes, sir; three and three-quarters; that is the biggest rope we have got on the pier.

Q. And you got your weights of the shipments from the company?

A. They are furnished to us; we furnished two and a half tons and no more; if it is——

Q. The weights are to be taken out of the hold and given to you separately, and the weights as if given to you, are more than two and a half, do you take them or not?

A. No, we do not take them.

76 Q. Did you have any way of ascertaining the weights, except as given to you by the steamship company?

A. No, unless the package is marked; a good many are marked with a certain weight on them, and of course we can see that, and if it is marked anything above ours, we don't lift them.

Recross-examination by Mr. Taylor:

Q. What sort of things do you use now?

A. Manila rope; just now? Sometimes manila rope and sometimes wire.

Q. Wire rope, do you mean?

A. Yes; sometimes we are—sometimes it is handier to use wire cables.

Q. Was that so at that time?
A. At that time we did not have no wires.
Q. You didn't use wires?
A. No.
Q. Didn't you get them just after the accident?
A. A certain time after, yes.
Q. Did you get them right after?
A. A certain time after.
Q. How much time?
A. I couldn't tell; it might be two or three months.
Q. In hoisting automobiles now, don't you use wires?
A. Sometimes.

Mr. Kerfoot: Objected to as not material or relevant.

Redirect examination by Mr. Kerfoot:

Q. Did you use this same kind of rope for a good many years for slings on automobiles?

A. Yes, sir, for the last thirty years, for all machinery. I have never used anything but rope slings until the last year and a half or so, either rope or chains.

Q. You have never used any larger than that?

A. I have never used any larger that that.

77 Q. Did you ever have any accident?

A. I never had an accident with them.

T. Hogan & Sons Rest.

Mr. Kerfoot: I move to dismiss the complaint as to T. Hogan & Sons, on the ground that there has been no negligence shown, and consequently if there is any negligence on the part of anybody for this accident, it is that of the steamship company in furnishing rope not sufficient to handle a weight which they, and they alone, knew. We got the weights from them and we got the ropes from them.

The Court: I do not look at it in that way, not on this testimony. I will deny your motion.

Mr. Kerfoot excepts.

Testimony closed.

Counsel summed up the case.

78 United States District Court for the Southern District of New York.

OGDEN M. REID, Libellant,
against
JAMES C. FARGO, as President of the American Express Company, Respondent, and International Mercantile Marine Company, Impleaded, Respondent.

Testimony of William Thomas Potts, a Witness on Behalf of the Respondent, James C. Fargo, as President of the American Express Company, Taken at the Office of Carter, Ledyard & Milburn, Attorneys, No. 54 Wall Street, New York City, County and State of New York, on the 5th Day of December, 1912.

Appearances.

Harrington, Bingham & Englar (T. C. Jones), for Libellant.
Carter, Ledyard & Milburn (Walter F. Taylor and Walter H. Merritt), for Respondent, James C. Fargo.
79 Burlingham, Montgomery & Beecher (Norman B. Beecher), for Respondent, International Mercantile Marine Co., Impleaded.
O'Brien, Boardman & Platt (George W. Field), for Respondent, T. Hogan & Sons.

Signing, sealing and certification waived.
Copies of testimony to be furnished to parties.
Stenographer's fees to be taxed.

WILLIAM THOMAS POTTS, having been duly sworn to testify the whole truth, testified as follows:

Direct examination by Mr. Taylor:

Q. Mr. Potts, what is your full name?
A. William Thomas Potts.
Q. Where do you live?
A. 84 Queen Street, London, England.
Q. Are you sailing for England shortly?
A. Saturday, the 7th.
Q. What is your occupation?
A. General Traffic Agent of the American Express Company with offices at London.
Q. Your duties covering what territory?
A. Europe.
Q. You are General Traffic Agent for Europe?
A. In charge of west-bound traffic.
Q. Your headquarters being in London?
A. Yes.
Q. How long have you occupied that position, Mr. Potts?

A. About fifteen years. But I have been associated with westbound business for nearly thirty years.

80 Q. That is, in London?

A. Yes.

Q. In the employ of other companies than the American Express Company at first?

A. Of former agents of the American Express Company.

Q. That is, for fifteen years you have been acting for the American Express Company and before that you were acting for agents who then acted for the American Express Company?

A. To put it differently, for years previously indirectly through their agents on the other side.

Q. The American Express Company, in the conduct of its business in Europe, receives goods and forwards them by steamship lines to the United States?

A. Yes.

Q. There is a large volume of that business?

A. Yes.

Q. Your duties during the last fifteen years have included general charge of that business?

A. Yes, supervision and charge.

Q. Have you also had supervision of the fixing of rates given by the American Express Company to shippers who give goods to the American Express Company to be forwarded by it to ports on this side?

A. Yes.

Q. You have then, necessarily, during this time had a good deal to do with the ocean rates charged by the steamship companies?

A. Yes.

Q. I suppose those rates are the basis of the charges that the American Express Company makes with shippers, or one of the elements of those charges, and those rates are also paid by the Express Company?

A. Yes.

Q. So that you have to look after them in both aspects?

A. Yes.

Q. Can you tell us what the different bases are on which ocean freights from England to the United States are fixed?

81 Mr. Beecher: Objected to as immaterial, irrelevant and incompetent and not within the issues and not within the knowledge of this witness.

A. You ask me the basis on which the ocean rates are fixed?

Q. I refer to measure, weight and value.

A. There are three—ad valorem rates, measurement rate, or per ton rate of 2,240 lbs. on shipments from Great Britain to the United States.

Q. That is, the unit of charge would be per gross ton weight, per measurement ton of 40 cubic feet, or per unit of value, whatever it may be?

A. Yes.

Q. Are those systems fixing freight rates ever combined so tha size and value both enter into the fixing of the rate?

Mr. Beecher: Same objection.

A. Not within my knowledge.

Q. Will you explain just how those methods of fixing rates ar applied in case of shipments; for instance when a value is declared

A. The articles or commodities upon which an ad valorem rate i exacted is invariably provided for in the body of the bill-of-lading Goods for higher value for which a steamship may deserve a righ of exacting an ad valorem rate, but only in the case where the a valorem rate would result in a larger earning to the steamship. I other words, the rates exacted by the steamship are based upon wha will produce the largest revenue to the ocean carrier.

Q. If a package is presented to the steamship line for shipmen and there is an ad valorem rate on that class of goods and also measurement rate on that class of goods, what does the steamshi company do? How does it fix the rate?

82 A. It charges one or the other of the rates, whichever on netted the largest earning.

Q. It never combines the two considerations so as to make a com bination?

A. Not within my knowledge.

Q. In shipments from England to the United States, where th rates are ad valorem, what are the highest rates that you have know to be charged on any class of goods, class of shipments?

A. The highest rate?

Q. Yes.

A. One and one-tenth per cent.

Q. Is that a frequent rate?

A. No, that is rather an excessive rate. The average ad valore rate is one-half of one per cent.

Q. Are you familiar with the rates charged upon a shipment o automobiles from England to the United States?

A. Yes.

Q. Automobiles in cases?

A. Yes.

Q. Is the rate charged on automobiles shipped in cases, or rathe I should say, has such rate in your experience been fixed on a valorem or measurement basis?

Mr. Beecher: Objected to as immaterial, as relating to genera practice within the experience of the witness, and has no relatio to the case.

A. Always on a measurement basis.

Q. One of the steamship companies between England and th United States is the International Mercantile Marine Company, is i not?

A. Yes.

Q. I understand that the International Mercantile Marine Com

pany operates a number of lines which it owns, and controls other lines?

A. Well, of course, I cannot tell of the workings of that company. One of the lines forming the International Mercantile Marine
83 Company is the White Star Line and the other is the American Line.

Q. In the performance of your duties, the steamers of the International Mercantile Marine Company are among those by which you ship goods for the American Express Company, are they not?

A. Yes. And previous to the formation of that line, when they were run as independent lines.

Q. You then shipped over those lines?

A. Yes.

Q. And since the formation of the International Mercantile Marine Company you have shipped over——

A. By the same lines.

Q. Does the testimony that you have given in regard to ocean rates apply to the International Mercantile Marine Company and to shipments by the steamers of that company?

A. Yes.

Q. And by its constituent lines?

A. Yes.

Q. I think you said that the American Line is one of the lines of the International Mercantile Marine?

A. Yes.

Q. Do you know whether the International, the American Line or the White Star Line issues schedules of rates or tariffs, or anything analogous thereto?

A. Yes, they issue schedules of ocean rates.

Q. And has it been their practice to do so for some years?

A. Yes, it certainly has.

Q. Will you look at the paper I now show you and state what that paper is?

Mr. Beecher: Objection, unless witness has personal knowledge of paper.

A. This is a printed schedule of ocean rates issued by the American Line-White Star Line.

Q. Do you know, in fact, whether that is a copy of the
84 tariff issued by the American Line-White Star Line covering the year 1910?

A. Yes, I do know.

Schedule marked as Respondent James C. Fargo's Exhibit 1 for identification December 5, 1912.

Q. Are the freight rates stated in these tariffs practically adhered to by the American Line-White Star Line, and other lines?

Mr. Beecher: Objected to as immaterial, irrelevant, incompetent, and not within the knowledge of the witness.

A. Yes.

Q. In the case of regular shippers such as the American Express Company, are the rates specified in these tariffs ever changed without previous notice to the express company?

Mr. Beecher: Same objection.

A. No.

Q. Did you ever know of a case where a higher rate than the rate specified in these tariffs was charged upon goods presented for shipment, there having been no previous notice of a change of rate?

A. No.

Q. Under the heading "Automobiles" in the tariff, of which a copy is marked Respondent James C. Fargo's Exhibit 1, there are certain figures—25/ and 10% measurement, 30/ and 10% measurement. Will you state what those figures refer to, pounds, shillings, pence, or otherwise?

A. The rate quoted as 25 shillings and 10% measurement is per ton of 40 cubic feet from alongside steamer at Southampton to New York, while the rate of 30 shillings and 10% measurement is also per ton of 40 cubic feet through from London warehouse to
85 New York, which means collection at the London warehouse and transit from there to the ship at Southampton.

Q. Did you personally, Mr. Potts, have anything to do with the receipt or shipment of the automobile of Mr. Ogden Reid, the libellant in the present action?

A. No, only in a general capacity.

Q. Just what do you mean, "in a general capacity"?

A. I mean that the shipment would come into the office but I would not personally arrange the cost of transportation. One of my subordinates would do that. The shipments come under my review, of course, after the departure of each steamer.

Q. The bill of lading issued by the International Mercantile Marine Company to the American Express Company, covering the automobile of Mr. Ogden Reid, contains no statement of the value of the automobile, Mr. Potts. Do you know whether in fact the value of the automobile was furnished to the Steamship Line?

Mr. Beecher: I object to inquiry not directed to the witnesses' personal knowledge.

Q. I ask, do you know whether that value was furnished to the Steamship Line?

A. The value of an automobile is never furnished to a steamship line and in my experience they have never been notified of the value of an automobile shipped.

Mr. Beecher: I move to strike out the answer as not responsive.

Q. In shipments from Southampton, Mr. Potts, does the American Express Company furnish the steamship line with any statements of value aside from the statements of value furnished to it in connection with the fixing of freight rates?

86 Mr. Beecher: Objected to as immaterial, irrelevant and incompetent, and not relating to the particular transaction at issue.

A. The steamship itself is furnished with the specifications giving the value and contents of all packages shipped, which are prepared for Custom House purposes. This is done as a matter of courtesy to the steamships at that port to enable them to verify and check their own manifest. Also furnished to the Customs authorities at Southampton.

Q. By the Customs authorities you mean the Customs authorities at Southampton?

A. Yes.

Q. What is the specification to which you refer?

A. The specification is of the particulars of the shipment which are required by the law to enable the Government to compile their statistics of the shipments forwarded from British ports.

Q. Did this practice of furnishing the specifications to the steamship prevail in 1910?

A. Yes. I might further add that that practice has resulted in the correction of errors, which has enabled the steamship people to obtain a higher rate as a result of such errors or omissions.

Q. You mean the correction of errors in the freight rates charged?

A. In the freight rates, yes.

Q. Then the steamship lines do refer to these specifications in connection with their freight rates?

A. They have done so.

Q. Do you know in fact whether the specification relating to Mr. Reid's automobile was furnished to the steamship line at Southampton?

A. No.

Mr. Taylor: I shall ask that the bill of lading to which I have referred be marked Respondent Fargo's Exhibit 2 for Identification.

(So marked December 5, 1912.)

87 Q. Can you, by the examination of the Respondent Fargo's Exhibit 2 for Identification state what the rate actually charged upon Mr. Reid's automobile was from Southampton to New York?

A. 25 shillings and 10% ton of 40 cubic feet.

Q. Making the total freight what?

A. £22, 12 shillings.

Q. Upon ad valorem basis, assuming the automobile to be worth £800, what ad valorem would have been necessary to yield that freight rate?

Mr. Beecher: Objected to as immaterial, irrelevant and incompetent.

A. Well, nearly 3%. 3% would be £24.

Q. And you have stated that you have never known an ad valorem freight rate in excess of one and one-tenth per cent.?

A. Yes.

Q. I will ask that the papers that I will refer to as shipper's

declaration and instructions for shipment of automobiles be marked Respondent Fargo's Exhibits 3 and 4 for Identification.

(So marked December 5, 1912.)

Q. Will you state whether the American Express Company in receiving automobiles for shipment from London to the United States takes from the shippers usually documents of the character of Respondent Fargo's Exhibit 3 for Identification and Respondent Fargo's Exhibit 4 for Identification?

Mr. Beecher: Objected to as immaterial, irrelevant and incompetent, and not relating to any fact within the knowledge of this witness or relating to the particular transaction in issue here.

A. Yes, those are the documents.

88 Q. Is this statement, entitled "Shipper's Declaration," taken for the purposes of making the specification furnished to the English Customs authorities, or has it to do with the American Customs?

A. No, it is a record that serves the twofold purpose. This form here (pointing) is advice of the shipment furnished by the consignor to enable us to compile the proper documents.

Q. Both for dealing with the English Customs authorities and for dealing with the American Customs authorities?

A. Every party that is interested in that particular transaction.

Q. Has the American Express Company received and forwarded a large number of automobiles?

A. A very large number.

Q. Have you, personally, had to do with any of those shipments?

A. Yes, frequently.

Q. Have you, personally, had to do with shipments by the International Mercantile Marine vessels?

A. Yes, frequently.

Q. Have you, personally, had correspondence with that line in relation to obtaining space for shipments of automobiles, rates thereon, and other similar matters?

A. Yes.

Q. This has been true in regard to shipments of automobiles from Southampton to New York over the American Line?

A. Yes.

Mr. Taylor: This is all.

Cross-examination by Mr. Beecher:

Q. You have the entire westbound business from Europe, including all Great Britain, of your company in charge, have you?

A. Yes.

Q. That means the shipment of millions of packages a year, I suppose?

A. Millions is a large number.

Q. But you do a large business?

A. Yes.

89 Q. I suppose it is fair to say that you ship many hundreds of thousands?

A. Many thousands, I would say.

Q. Don't you ship hundreds of thousands of separate articles?

A. I would not say hundreds of thousands. We might get fifteen hundred cars of china clay, for instance, or hundreds of cars of straw-plat and call each——

Q. How many separate packages do you suppose you ship westbound from Europe a year?

A. Impossible for me to say. Probably many thousands.

Q. Can you give me anything more definite than that? Does it not amount to several thousands?

A. Yes.

Q. Of course, as to a vast majority of those shipments you never know of their existence?

A. Yes, I do.

Q. They don't come to your personal knowledge, do they?

A. They come to me under review.

Q. Does any ordinary shipment come to you under review?

A. Yes, in the weekly records.

Q. Merely the statistics?

A. Yes.

Q. You don't see any papers in regard to them, bills of lading, shipper's instructions, or any other matter of that sort with regard to a vast majority of such shipments, do you?

A. No.

Q. I understood you to say as to this particular shipment of Mr. Ogden Reid's that you had no personal knowledge connected with it?

A. Quite right.

Q. In your direct testimony did you appreciate the difference between personal knowledge and knowledge which you may have gained by hearsay?

A. Personal knowledge is proved by documentary evidence.

Q. So that in testifying you were not only attempting to give your knowledge, derived from your personal acquaintance with the transaction, but also the knowledge which you may have

90 gained by seeing documents?

A. Yes.

Q. And when you stated that the specification in this particular case was delivered to the Steamship Company you had no personal knowledge of that delivery, did you?

A. Beyond the fact that I originally arranged that those specifications should be furnished to the Customs through the Steamship Company.

Q. You arrange that all such specifications should be furnished for that particular Steamship Company?

A. Yes.

Q. But as to whether this particular specification covering Mr. Reid's automobile was furnished you have no knowledge whatever?

A. Aside from regular practice.

Q. Then you have no personal knowledge in regard to whether it was so furnished or not?

A. Nothing beyond that.

Q. You are merely stating a conclusion based upon your belief that your instructions are carried out?

A. Exactly.

Q. A large number of shipments are made and arrangements for space and rates are made with the steamship companies, including the steamships of the American Line, as to which you have no personal knowledge whatever, is not that true?

A. Yes.

Q. And when you testified that you never knew the ad valorem rate to be combined with weight and measurement as a basis of rates, you are referring to your own personal experience only?

A. I am. I think I said so.

Q. The ocean carriers are, of course, at liberty to charge whatever rates they can get for the business, are they not?

Mr. Taylor: I object to that. He is not an authority on questions of law.

91 A. The steamship companies have a right to demand any rate they can get.

Q. And those rates fluctuate from time to time, do they not?

A. Yes.

Q. For instance, at the present time ocean rates are very high compared to what they were a short time ago?

A. It all depends on what you mean by a short time ago.

Q. They have been going up steadily for the past year, have they not?

A. Not in the New York trade. They have increased, of course, during the past year.

Q. The schedule, Respondent Fargo's Exhibit 1 for identification, which was shown to you, have you ever seen that before?

A. Yes.

Q. That particular paper?

A. No, I don't know whether it was that particular paper.

Q. Can you say whether you have ever seen this particular paper before?

A. That is a printed document, I could not swear.

Q. Do you know when that paper was issued by the Steamship Company or any other person?

A. You mean at what period of the year?

Q. The precise date?

A. No.

Q. And you don't know what other papers of a similar nature were issued at any particular time by the International or the American Line, do you?

A. I am prepared to swear there were none.

Q. You mean there have been no other papers similar to this Exhibit 1 issued since 1910?

A. There have been reissues of the document, of course.

Q. Just when those reissues have taken place you cannot say?
A. They are made effective from the 1st of January each year.
Q. Can you say when any reissue has taken place?
A. No.

92 Q. Now, when you said that the specifications which, pursuant to your directions, were delivered to the steamship companies were used to correct errors in the freight rates at times, did you mean that the steamship companies would collect freight based upon a valuation given to them by you and then, discovering from the specification that the value was incorrectly stated, would demand more freight?

A. No. Corrections of ocean rates have been made not through any incorrect statement of value but merely as a result of additional information that came subsequent to the shipment being made.

Q. Well then, the value given at the time of the shipment being made would be found to be incorrect?

A. The value is not demanded.

Q. How would the specifications be used to correct the freight rate? How would it affect the freight rate?

A. If a shipment of laces, for instance, came from the Continent, if it was of exceptional value and it came to us as a package of dry-goods and through specifications the Company was able to see that the contents of the package consisted of laces they would have the right to require an ad valorem rate.

Q. They would have the right to demand an ad valorem rate?

A. They have the right to do so and they have done so.

Q. Do you always charge the same rate to every shipper of automobiles?

Mr. Taylor: Objected to as irrelevant and immaterial.

A. Rates vary according to services rendered.
Q. And your rates vary with different shipments, do they?
A. Of course.

Mr. Beecher: That is all.

93 Cross-examination by Mr. Jones:

Q. Mr. Potts, this document, or a copy of it, was handed to the American Express Company by the American Line?
A. Yes.
Q. This document appears to be dated December 31st, 1909, and purports to be f[illegible]t rates American Line-White Star Line from January 1st 1910, subject to thirty days' notice. What is meant by "subject to thirty days' notice"?
A. Subject to thirty days' notice of change.
Q. Was any such notice given you prior to the time this car of Mr. Reid's was delivered to the American Express Co. or delivered to the American Line?
A. No. That rate was in operation for the whole year.
Q. If such a notice had been given would it have come to your attention?
A. Yes, immediately.

Q. By measurement, Mr. Potts, does it mean the measurement of the article or the measurement of the space occupied in the ship's hold by the article?

A. The measurement of the package; consequently the space occupied.

Q. If that space should be a fractional part of the cubic ton would the entire ton be charged for or would a fractional part?

A. A fractional part.

Mr. Jones: That is all.

Recross-examination by Mr. Beecher:

Q. Mr. Potts, you state in answer to the last questioner that this particular document, Respondent Fargo's Exhibit 1, was delivered to the American Express Company by the American Line?

A. Yes.

Q. You have no personal knowledge in regard to that, have you?

A. Certainly.

Q. Was it delivered to you?

A. No.

94 Q. Then how have you any personal knowledge in regard to it?

A. Because I was notified immediately upon receipt by my representative.

Q. Merely by the representative?

A. Yes.

Q. You simply mean, then, that you didn't learn of any notice of change yourself?

A. Well——

Q. Answer the question yes or no.

A. No. I may add to that. If it had been the intention of the Steamship Company to increase the rate they would have notified us by letter.

Q. And in stating that the Company received no notification you simply mean that you didn't learn of the receipt of such notification?

A. I mean that I did not receive any and I also mean that there was no change made.

Q. Of course you have no personal knowledge in regard to it?

A. It would have been brought to my attention immediately if the rate had been increased or decreased.

Q. That is, if all your employes had done their duty?

A. Yes.

Mr. Beecher: That is all.

Redirect-examination by Mr. Taylor:

Q. You have said, Mr. Potts, that arrangements for rates and space were made without your personal knowledge of the particular instances. Would that be true or would it not be true where the rates charged by the steamship line were a deviation from its regular tariffs?

A. It would not be true.

Q. Would you be consulted in cases where rates were charged different from that of the regular tariffs?

A. The matter would be referred to me for such action as might be necessary either in form of protest to the steamship company or some other.

95 Q. In what you have said in regard to correction of freight rates by reference to the specifications, do I understand your meaning to be that valuations have been raised by reference to specifications or that the rates have been changed from the measurement rates to ad valorem rates where the specifications disclosed the fact that the ad valorem rate would be higher?

A. Yes, that is so. The rate has been amended from a measurement basis to an ad valorem rate when the value of the package would produce to the steamship company a larger revenue as a result of an ad valorem rate as against a measurement rate.

Q. Aside from such changes from a measurement to an ad valorem basis, do you know of any corrections of freight rates based on the specifications?

A. No. It is very exceptional when anything of that kind happens. It only comes from a clerical error or something of the kind.

Q. When you stated, Mr. Potts, that you didn't know whether Respondent Fargo's Exhibit 1 was the paper that had been furnished you or that you had seen before, what did you mean by that?

A. I means personally, of course.

Q. You meant personally in reference to this?

A. Yes.

Q. But was it your meaning that you did not know whether you had ever seen the tariff set out in this paper or that you had never seen this copy of the tariff?

A. That copy of the tariff.

Q. You had, in fact, seen the tariff of which this paper is a copy?

A. Exactly. I use it daily.

Recross-examination by Mr. Beecher:

Q. How many automobiles do you suppose the American Express Company ships westbound every day?

A. That is impossible to say.

Q. Roughly?

A. Several hundreds.

96 Q. That was true in 1910, was it?

A. The volume was not so large in 1910.

Q. It would amount to over several hundred even in 1910?

A. Yes.

Mr. Beecher: That is all.

Interlocutory Decree.

At a Stated Term of the United States District Court, for the Southern District of New York, held in the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 28th day of March, 1913.

Present: Honorable Van Vechten Veeder, District Judge.

OGDEN M. REID, Libellant,
against
JAMES C. FARGO, as President of the American Express Company, Respondent: The International Mercantile Marine Company, Impleaded, Respondent; T. Hogan & Sons, Inc., Impleaded, Respondent.

This cause having been heard on the pleadings and proofs, and argued and submitted on the 25th day of March, 1913, by
97 the advocates for the respective parties, and the Court having filed an opinion holding the respondents, T. Hogan & Sons, Inc., and James C. Fargo, as President of the American Express Company, liable for the damages sustained by the libellant by reason of the matters set forth in the libel herein;

Now, therefore, on motion of Harrington, Bigham & Englar, proctors for the libellant, it is

Ordered, adjudged and decreed, that the libellant have and recover as hereinafter provided the amount of damages by him sustained by reason of the matters set forth in the libel herein, with interest and costs, from the respondents T. Hogan & Sons, Inc., and its stipulators for costs, and James C. Fargo, as President of the American Express Company, and his stipulators, for costs, and that upon the assessment of libellant's damages, as hereinafter provided for, libellant have judgment against the respondent T. Hogan & Sons, Inc., in the first instance, and against the respondent James C. Fargo, as President of the American Express Company, in the event and to the extent that libellant is unable to collect, upon execution, the amount of the judgment hereinbefore directed to be entered in the first instance against T. Hogan & Sons, Inc., and its stipulators for costs; and it is

Further ordered, adjudged and decreed, that the petition of the respondent James C. Fargo, as President of the American Express Company, impleading the International Mercantile Marine Company as a party respondent herein, be, and the same hereby is, dismissed; and it is

Further ordered, that it be, and it hereby is referred to Herbert Green, Esq., Commissioner, to ascertain and compute the
98 amount of libellant's damages herein, and to report thereon to this court with all convenient speed.

Enter.

VAN VECHTEN VEEDER,
U. S. D. J.

Notice of settlement of the foregoing interlocutory decree is hereby waived.

Dated New York, March —, 1913.

O'BRIEN, BOARDMAN & PLATT,
Proctors for Respondent T. Hogan & Sons, Inc.
CARTER, LEDYARD & MILBURN,
Proctors for Respondent James C. Fargo, as President of the American Express Co.
BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent International Mercantile Marine Company.

99 United States District Court, Southern District of New York.

OGDEN M. REID, Libellant,
vs.
JAMES C. FARGO, etc., Respondent; The International Mercantile Marine Company, Impleaded, Respondent; T. Hogan & Sons, Incorporated, Impleaded, Respondent.

Sirs: Please take notice that the annexed is a copy of a final decree duly filed and entered this day in the above entitled action in the office of the Clerk of the United States District Court for the Southern District of New York.

Dated, New York, July 24th, 1913.

HARRINGTON, BIGHAM & ENGLAR,
64 *Wall Street, New York City, Proctors for Libellant.*

To Carter, Ledyard & Milburn, Proctors for James C. Fargo; Burlingham, Montgomery & Beecher, Proctors for International Mercantile Marine Co.; O'Brien, Boardman & Platt, Proctors for T. Hogan & Sons, Inc., Respondents.

100 *Final Decree.*

At a Stated Term of the District Court of the United States held in and for the Southern District of New York, at the Court Rooms thereof in the Federal Building, in the Borough of Manhattan, City, County and State of New York, on the 23rd day of July, 1913.

Present Hon. Van Vechten Veeder, District Judge.

OGDEN M. REID, Libellant,
against
JAMES C. FARGO, as President of the American Express Company, Respondent; The International Mercantile Marine Company, Impleaded, Respondent; T. Hogan & Sons, Incorporated, Impleaded, Respondent.

The above entitled cause having been heretofore referred to Herbert Green, Esq., as Commissioner, to ascertain and report on the

amount of damages suffered by the libellant as a result of the matters and things alleged and set forth in the libel herein, and the said Commissioner having filed his report on the 18th day of June, 1913, and have reported therein that the damages to which
101 the libellant is entitled amount to $2,724.40, with interest thereon from January 5th, 1911, and no exceptions having been filed to the said report, and the costs herein having been taxed in the Clerk's office of this court in the sum of $237.88;

Now, on motion of Harrington, Bigham & Englar, proctors for the libellant herein, it is

Ordered, that the said report of Herbert Green, Esq., the Commissioner, as aforesaid, be and the same is hereby in all respects confirmed and approved; and it is further

Ordered, adjudged and decreed, that the libellant recover of T. Hogan & Sons, Incorporated, and its stipulators for costs, the sum of $2,724.40, with interest thereon from January 5th, 1911, which has been computed at $415.47, and its costs as taxed, making in all the sum of $3,377.75; and it is further

Ordered, adjudged and decreed that in the event and to the extent that the libellant is unable to collect upon execution the amount of the judgment hereinbefore entered in the first instance against T. Hogan & Sons, Incorporated, and its stipulators for costs, that the libellant recover of James C. Fargo, as President of the American Express Company, and his stipulators for costs, whatever portion of the judgment entered against the said T. Hogan & Sons, Incorporated, and its stipulators for costs, which the libellant may be unable to collect upon execution from the said T. Hogan & Sons, Incorporated; and it is further

Ordered, that unless the judgment hereinbefore awarded be satisfied within the time allowed by the rules and practice of this court, that execution issue against the respondent T. Hogan & Sons, Incorporated, for the judgment awarded, as aforesaid, in accordance with the terms of this decree.

VAN VECHTEN VEEDER,
U. S. D. J.

102 *Notice of Appeal.*

United States District Court for the Southern District of New York.

OGDEN M. REID, Libellant,
against
JAMES C. FARGO, as President of the Adams Express Company, Respondent; The International Mercantile Marine Company, Impleaded, Respondent; T. Hogan & Sons, Incorporated, Impleaded, Respondent.

Sirs: Please take notice that the respondent, T. Hogan & Sons, Incorporated, hereby appeals to the next term of the United States

Circuit Court of Appeals for the Second Circuit from the
103 final decree of this Court entered herein July 19, 1913, and from each and every part of said decree.

Dated New York, July 21, 1913.

Yours, etc.,

O'BRIEN, BOARDMAN & PLATT,
Proctors for Respondent T. Hogan & Sons, Incorporated.

Office and Post Office Address, Two Rector Street, New York City.

To Messrs. Harrington, Bigham & Englar, Proctors for the Libellant, 64 Wall Street, New York City; Messrs. Carter, Ledyard & Milburn, Proctors for Respondent James C. Fargo, 54 Wall Street, New York City; Messrs. Burlingham, Montgomery & Beecher, Proctors for Respondent The International Mercantile Marine Company, 27 William Street, New York City.

104 *Assignments of Error.*

United States District Court for the Southern District of New York.

OGDEN M. REID, Libellant,
against
JAMES C. FARGO, as President of the American Express Company, Respondent; International Mercantile Marine Company, Impleaded, Respondent, and T. Hogan & Sons, Impleaded, Respondent.

The respondent T. Hogan & Sons, impleaded herein, assigns error in the decision of this Court as follows:

1. In that the Court failed to dismiss the libel herein as against respondent T. Hogan & Sons.

2. In that the Court did not make a decree herein in favor of the respondent T. Hogan & Sons.

3. In that the Court made a decree herein holding the respondent T. Hogan & Sons liable for the damage to the libellant's automobile.

105 4. In that the court made a decree herein holding the respondent T. Hogan & Sons primarily liable for the damage to the libellant's automobile.

5. In that the Court failed to find that the respondent T. Hogan & Sons were free from negligence contributing to the accident and that they performed their work in a careful, customary and proper manner.

6. In that the Court dismissed the libel herein as to respondent International Mercantile Marine Company.

7. In that the Court failed to find respondent T. Hogan & Sons solely the agent of the respondent International Mercantile Marine

Company in this transaction, and not in any case liable to libellant for any alleged negligence in the course of said employment.

8. In that the Court failed to find that it was the duty of the respondent International Mercantile Marine Company to supply respondent T. Hogan & Sons with safe and suitable rope for the unloading of libellant's automobile.

9. In that the Court failed to find that the respondent International Mercantile Marine Company did not supply safe and suitable rope for the unloading of libellant's automobile and were guilty of negligence in causing damage to libellant's automobile by failing so to do.

10. In that the Court failed to find that the damage to libellant's automobile occurred solely from the negligence of the respondent International Mercantile Marine Company.

11. In that the Court admitted improper and incompetent evidence.

106 12. In that the Court excluded proper and competent evidence.

Dated, New York, July 28, 1913.

O'BRIEN, BOARDMAN & PLATT,
Proctors for Respondent T. Hogan & Sons, Office & P. O. Address 2 Rector Street, Borough of Manhattan, New York City.

LIBELLANT'S EXHIBIT I.

United States District Court for the Southern District of New York.

OGDEN M. REID, Libellant,
against
JAMES C. FARGO, as President of the American Express Company, Respondent, and International Mercantile Marine Company, T. Hogan & Sons, Impleaded, Respondents.

It is hereby stipulated by and between the proctors for the respective parties hereto that the following statement of facts is true,
107 and that the same, or any part hereof, may be offered in evidence by any party hereto, subject, however, to all legal objections of any party as to the competency, relevancy, materiality or other ground of objection to its admission in evidence as to the whole or any part thereof:

On the 21st day of December, 1910, at the office of the American Express Company at London, England, Thomas Stevens delivered to the American Express Company a letter signed by William Walsh, the duly authorized agent of the libellant, a copy of which letter is annexed hereto and marked Exhibit I. At the same time and place said Thomas Stevens signed and delivered to the American Express Company certain paper or document, a copy of which is annexed hereto and marked Exhibit II; and also signed and delivered to the American Express Company a certain paper or document, a copy of which is annexed hereto, and marked Exhibit III. The auto-car referred to in Exhibits I, II and III was the property of the libellant, and is the auto-car or automobile mentioned in the libel.

Said auto-car thereafter was delivered to the American Express Company at London, and was packed in a case which was entirely enclosed, was the property of the libellant, and had previously been used by the libellant for shipment of said auto-car. The International Mercantile Marine Company was not advised and at no time had any knowledge of any of the facts with relation to the transactions hereinbefore described. The American Express Company thereupon caused said case, which measured six hundred and fifty-seven (657) cubic feet and four (4) inches, and contained said auto-car, to be transported by the London & Southwestern
108 Railway Company from London, England, to the docks of the American Line Steamship Company at Southampton, England, and there delivered the same to the International Mercantile Marine Company in good order and condition, and apparently well packed, for transportation to New York. Upon the delivery of said case and auto-car the American Express Company paid to the International Mercantile Marine Company the sum of £22.12.—being the freight for the transportation thereof from Southampton to New York. The International Mercantile Marine Company issued and delivered to the American Express Company the bill-of-lading, of which a copy is annexed hereto and marked Exhibit IV.

At no time was any declaration of a value in excess of One hundred dollars ($100.) upon said shipment declared to the International Mercantile Marine Company, otherwise than appears in the bill-of-lading, Exhibit IV, except that the respondent James C. Fargo claims that a valuation of £800 was stated in a certain paper known as a specification which it delivered to the international Mercantile Marine Company, and the only freight paid was the sum of £22—12. T. Hogan & Sons was not advised and at no time had any knowledge of any of the facts with relation to transactions hereinbefore described. The International Mercantile Marine Company is and was at the time mentioned in the libel the owner of the American Line.

The International Mercantile Marine Company carried said case and auto-car on the Steamship "Minnewaska," which sailed from Southampton, England, for New York on the 24th day of December, 1910.

On January 5th, 1911, at New York City, said case and motor car while being unloaded from the Steamship "Minnewaska" by
109 the International Mercantile Marine Company, or its agents or servants, fell into the waters of the Hudson River, and as a result thereof was damaged. The exact amount of damage sustained by the libellant may be ascertained by a reference, in accordance with the practice of this Court.

Dated, New York, March 21st, 1913.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.

CARTER, LEDYARD & MILBURN,
Proctors for James C. Fargo, as President, &c., Respondent.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for International Mercantile Marine Company, Respondent.

O'BRIEN, BOARDMAN & PLATT,
Proctors for T. Hogan & Sons, Respondent.

110 EXHIBIT I ATTACHED TO LIBELLANT'S EXHIBIT I.

(Copy.)

Dorchester House, Park Lane, W.,
December 20th, 1910.

Dear Sirs: T. Stevens, Mr. Ogden Reid's motor-driver will bring this note to tell you that Mr. Ogden Reid has decided to send his Peerless Car by the Minnewaska from Southampton on Dec. 24th. He will also ask you to furnish passage tickets for himself and family.

He will make all arrangements and bring the account to me. The car can be handed over to the packer Thursday morning.

Yours faithfully,

WILLIAM WALSH.

The American Express Co.

(Here follows Exhibit II, marked pages 111 and 112.)

CHART

TOO

LARGE

FOR

FILMING

113 EXHIBIT III ATTACHED TO LIBELLANT'S EXHIBIT I.

(Copy.)

Established 1841.

American Express Company, Foreign Department.

General Forwarders To and From Europe, United States, Canada and All Parts of the World.

General European Agents For New York Central and Hudson River Railroad and Merchants Despatch.

Instructions for Shipment of Automobiles.

(City) ——, (Date) Dec. 21, 1910.

Agent American Express Co.

Dear Sir: You are hereby requested to take charge of the following shipment:—

One 30 H P Peerless Automobile 30 H. P. with Touring body, valued at Eight hundred pounds to be consigned to Mr. Thos Stevens, a/c Mr. Ogden Reid New York and forwarded by Steamer, in bond to New York.

Please arrange for the packing of said automobile for account of owner, it being distinctly understood that the American Express Co. will assume no responsibility in regard to the packing.

114 The case is to be marked I. M. M. & Co. O. M. R.—New York—185.

Insurance is required for the sum of No insurance required. as follows:—

All Risks without limitation of minimum claim.

All Risks.—no claim to be entertained if damage is under 2% of value, minimum $40.

F. P. A. against ship being burnt, sunk, stranded or in collision.

I (or we) hereby guarantee that no petroleum whatsoever or any product thereof is contained in the automobile reservoirs, tanks, lamps, or elsewhere within the car or case, and that no oil or water remains in the tanks or radiator.

And I (or we) hereby authorise the tipping of the case, if necessary, in loading or unloading to and from the carrying vessel, railway car, wagon, or other conveyance employed for transportation and delivery.

If the carriage, Insurance premiums, Government charges and penalties, if any, in the event of false declaration or undervaluation, or any other lawful and customary expense in respect to above consignment cannot be collected from consignee, including claims for General Average (if consignment is uninsured) such charges will be paid by me.

us.

Shipper(s), THOMAS STEVENS,
Address, New York.

Copy of invoice must accompany this declaration to avoid delay and expense at American Custom House. See note under "Instructions and Conditions of Carriage and Insurance" shown on reverse side.

115 Memorandum NOT to be filled in by Shipper.

W/B No. ..... Adv. Charges.....
Date..... Insurance.....
To..... Our Charges.....
S.S. or Ry..... Return Charges on C.O.D.....
Total.....

Established 1841.

American Express Company.

Foreign Department.

New York: 65, Broadway.

London: 5, & 6, Haymarket, S. W.; 84, Queen Street, E. C.

Liverpool: 10 James Street.

Southampton: 18 Canute Road.

Glasgow: 30, Gordon Street.

Antwerp: 7, Quai Van Dyck.

Rotterdam: 17, Gedempte Glashaven.

Hamburg: 9, Alsterdamm.

Bremen: 139, Am Wall.

Copenhagen: 8, Kongens Nytory.

116 Rome: Piazza Venezia.

Genoa: 17, Piazza Nunziata.

Naples: 27, Via Vittoria.

Paris: 11, Rue Scribe; 54, Rue des Petites-Ecuries.

Havre: 43, Quai d'Orleans.

Marseilles: 9, Rue Beauvau.

Transports Merchandise, Parcels, Valuables, Passengers' Baggage, etc., by Fastest Steamers to and from Europe and All Parts of the United States, Canada, Mexico, and the World.

Shipping and Banking Correspondents at All Principal Points in the Commercial World.

The Only Company under Above Title Authorized by the United States Government to Carry Goods in Bond to Interior Ports of Entry in the United States, and Through U. S. to Canada, Mexico, &c. (See Below).

Conditions of Carriage and Insurance.

1. The shipment covered by this declaration is only accepted by the American Express Company as a Forwarding Agent for the

shipper, subject to the Bills of Lading, regulations and liability of the different Railways, Transportation Companies, Steamers, Carriers and others through whose hands it may pass. All risk and responsibility of said American Express Company for loss,
117 damage or delay to said property will cease on delivery in transit to such Railway, Transportation Company, Steamer, Carrier or other person necessarily employed in the handling and transportation of the shipment from point of origin to destination.

2. Packages containing articles of a Dangerous or Explosive nature Will Not Be Accepted on any conditions whatever; and any person who shall omit to fully declare the nature of any explosive, inflammable or otherwise dangerous matter will render himself liable for any damage or penalties arising from the nature of such goods, whether such Shipper shall be aware of the nature of such goods or not, and whether such Shipper shall be principal or agent only.

3. Parcels for different consignees, made up in single packages addressed to one person for delivery, must be specially contracted for, or will, upon examination at Custom House, be charged with the proper freight on each package, which will be collected before delivery.

4. Unless the senders state by which route or service their Goods are to be forwarded, the carriers will use their own discretion.

5. If any sum of money is to be collected on delivery, or insurance is required, the Shipper must so enter on the reverse side of this sheet.

6. The American Express Company is not to be held liable for any loss or damage except As a Forwarding Agent Only, nor for any loss, damage or delay, by fire, by the dangers of navigation, by the acts of God or the enemies of the Government, by the restraints of Governments, mobs, strikes, riots, insurrections, pirates, or from, or by reason of, any of the hazards or dangers incident to a state of war.

118 7. Nor shall the American Express Company be liable for any default or negligence of any person, corporation or association to whom the within described property shall or may be delivered by this Company, for the performance of any act or duty in respect thereto, at any place or point off the established routes or lines run by this Company; and any such person, corporation or association, is not to be regarded, deemed or taken to be the agent of this company for any such purpose, but, on the contrary, such person, corporation or association shall be deemed and taken to be the agent of the person, corporation or association from whom this Company received the property within described. It being understood that this Company relies upon the various Railroad and Steamship lines, for its means of forwarding property, it is agreed that it shall not be liable for any losses or damages caused by the detention of any Railway train or any Steamship or other vehicle upon which the said property shall be placed for transportation; nor by the neglect or refusal of any Railroad Company, or other transportation line to receive and forward the said property. Nor

shall this Company be liable for any losses or damages caused by detention of said property due to Customs Regulations or by errors and insufficiency in the marks, addresses, or shipping numbers of packages.

8. It is further agreed that this Company is not to be held liable or responsible for any loss of or damage to said property, or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said Company or its servants; Nor Upon Any Property or Thing Unless Properly Packed and Secured for Transportation; Nor Upon Any Fragile Fabrics, or Any Fabrics
119 Consisting of or Contained in Glass; nor shall this Company be held liable or responsible for any damage to dangerous, corrosive, explosive or inflammable goods, even if the true nature has been declared to the Company. Nor shall this Company be liable for injury, damage, accidents to or mortality of any shipment of animals or birds from any cause whatsoever, such shipments being accepted only at owner's risk. Nor shall this Company be responsible for straps on baggage, accessories or other detachable parts of automobiles, bicycles, etc.

9. If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the within described property, and the same is not paid, or if in any case the consignee cannot be found or refuses to receive such property, or for any other reason it cannot be delivered the American Express Company reserve the right to return, or order to be returned, said property to the shipper, subject to the conditions of their receipt, and payment of all charges and that the liability of the American Express Company or its connections for such property while in its possession for the purpose of making such collection, shall be that of Warehousemen only. The Company reserve the right, if they so elect, to sell such property in accordance with the laws of the country of destination in order to satisfy the charges for transportation and other expenses thereon. If, on a sale of the goods, the proceeds fail to cover charges for transportation and expenses this Company will be entitled to recover the difference from the shipper.

10. In no event shall the American Express Company be liable for any loss, damage or delay unless the claim therefor shall be presented to it in writing at point of shipment within Ninety
120 Days after date of shipment, in a statement to which the receipt shall be annexed.

11. It is further agreed that any carrier or party liable on account of loss or damage to any of the within described property, shall have the Full Benefit of Any Insurance that may have been effected upon or on account of said property.

12. And it is also understood that the stipulations contained herein shall extend and inure to the benefit of each and every company or person to whom, through this Company, the within described property may be entrusted or delivered for transportation.

13. Deliveries to domicile or Custom House at destination in U. S. A. or Canada are only to be made within the free delivery

limits already established at time of shipment. Transportation charges do not include Government, Frontier, or Port charges, and are to station or wharf only.

14. Delivery of Goods forwarded In Bond to Inland Ports of Entry in the United States shall be considered complete when delivered to the Customs officials at the Inland Ports of Entry, and such delivery shall be deemed a discharge of the receipt and of all and any liability attaching thereto.

15. As the Railroad Companies, Steamship Companies, and other carriers, employed by the American Express Company for transportation, reserve the right to charge for carriage of shipments of value on an ad valorem basis the American Express Company in turn reserves the right in the event of discovering that shipments made through its medium have been undervalued, to assess charges on the full valuation, and at the rate which would have been employed in the first instance had full value been declared by the shippers. In the event of discovery after delivery that a
121 shipment was undervalued, the Company will demand correct charges on actual value from the parties in interest.

16. It is understood and agreed that no goods shipped by or through this Company will be insured against General Average, perils of the sea, fire, pilferage, breakage, damage by water (or other liquids), steam, dampness or mildew, unless shipper's special instructions to insure are written in the declaration form or advice note, premium paid in accordance with the kind of insurance required, and a special Memorandum of Insurance covering such risks, is handed to the shipper by the Company. The Company's charges, unless insurance is effected, will cover transportation only. Leakage or deterioration of goods will not be covered by insurance.

17. All insurance, unless effected in some other Insurance Company, will be subject to the conditions and exceptions of Lloyd's London Policies, in accordance with the kind of insurance taken out. Marine insurance ceases on delivery of goods on wharf at destination, and door to door insurance ceases when goods are tendered for delivery either at door of Custom House (when in bond) or domicile of consignee.

18. Claims for losses under insurance must be accompanied by usual proofs of value and will be subject to all averages according to the established practices of insurance underwriters in London. When goods are insured for less than value, the insurers will be liable only in proportion as the amount of insurance undertaken relates to the actual value.

122 Note.

Under United States Customs laws, severe penalties are inflicted for undervaluations of importations, viz., One Per Centum Fine for each one per centum undervaluation, and when latter exceeds fifty per cent of value of goods as entered at Custom House, Absolute Seizure Follows in Addition to the Above-Named Penalty. Failure

to promptly pay such penalty subjects the importer to prosecution in the United States Courts.

The United States Customs laws require that goods shall be entered at Current Open Market Value at Place of Purchase. Therefore, in the case of any purchases made at Less Than Market Prices, there must be added to invoice, either by the seller or purchaser of goods, a notation plainly showing the "Current Open Market Value at Time and Place of Purchase."

In view of the requirements of the United States Government or Customs requirements in other countries, it is further distinctly understood and agreed that the shipper assumes all liability for additional duty assessed, or fines or penalties imposed by the Customs Authorities, by reason of any undervaluation or erroneous invoices of the property covered by this declaration, and shall at once refund to the American Express Company any payments made by it in satisfaction of demands for additional duty or penalty or expenses in Quarantine relating to the shipment.

Special Notice.—Where goods are of a character to be easily damaged by dampness or mildew, shippers are advised to have same packed in cases lined with tin or zinc. Valuable goods should be insured.

N. B.—No employe of the Company is authorized to dispense with or vary these conditions.

123 *Shipments in Bond for United States.*

Please observe the following instructions:

1. Each Package must be fully addressed or have a shipping mark; and in either case bear the name of the Port to which "Immediate Transportation" is desired.

Illustration.

John Smith.

In Bond to Omaha.
or
J. S.
Evanston, Ill.
In Bond to Chicago.

2. The Port of Entry to which Immediate Transportation is desired, also the final destination and shipping mark, must appear on Invoice of goods and should be in the same handwriting (Shipper's) as balance of Invoice. This is essential for all shipments under the Immediate Transportation Law.

3. An Invoice must accompany each shipment, and if the value is over $100 the Invoice must be certified to by the United States Consul, as such shipments cannot be forwarded In Bond, without appraisement at first Port of Entry, unless a certified Consular In-

voice is produced. Certify in quadruplicate, and hand us the two copies returned to you by the Consul.

4. For shipments to Canada, three invoices, with certificates, are required, one for bonding at New York and two for entry at the Canadian Customs. Copy of Bill of Lading or Express Re-
124 ceipt must accompany Invoices for shipments to Canada to ensure lowest rates of duty. Each package, invoice and Bill of Lading must bear notation "In Bond to —— —— (final destination); for example "In Bond to Toronto, Ontario." (Not In Bond to Canada).

5. Shipments passing through the United States in bond to points in Mexico must be accompanied by invoices showing both the gross and net weights. Failing such invoices, the shipments will be held up at the Mexican frontier, pending their receipt.

Advise consignees that your shipments are forwarded by American Express Company.

125 EXHIBIT IV—ATTACHED TO LIBELLANT'S EXHIBIT I.

January, 1903.

Form A.

American Line.

(Cut of Steamship.)

Southampton to New York.

American Line Offices.

1, Cockspur Street, S. W., 38, Leadenhall Street, E. C., London; 30, James Street Liverpool; Canute Road, Southampton.

International Mercantile Marine Co., Whitehall Building, Battery Place, New York.

I. M. M. Co. O. M. R.	185, 657′ 4″	New York.	1/C Automobile W. E.

Freight Prepaid

All claims for loss, damage or otherwise howsoever, against the Shipowners or their Agents or servants, or the Ship, under or in respect of this Bill of Lading, or in respect of the goods, shall be made and settled in England and in the English Courts,
126 and no proceedings under or in respect of this Bill of Lading, or in respect of the goods, shall be taken against the Shipowners, or their Agents or servants or the Ship in any other country, and the Shippers by accepting this Bill of Lading agree that if

by the law of any other country the Shipowners or their Agents or Servants or the Ship become liable for any such claim by any person for which they would not be liable according to the terms of this Bill of Lading under English Law, then and in every such event, the Shippers shall indemnify the Shipowners, their Agents and servants against such liability and all costs and expenses of any proceedings relating thereto.

Charges forward.....

	Tons.	Cwt.	Qrs.	Lbs.				
Freight on					at		per ton,	£
Freight on	657	Ft.	4	In.	at	25	per ton	£20—10—11
				£	@		per cent.	2— 1— 1
				Primage	10		per cent.	

Total..... £22—12 0 stg.

Post to W./B.'s $109.61
Accept Voucher @ 485

Printed by The Liverpool Printing & Stationery Co., Ltd., Mercer Court, Redeross Street.
10,000—16-11-10.

Shipped, in apparent good order and condition, by American Express Co. to be transported by the British Steamship called the Minnewaska and now lying in the Port of Southampton, and bound for New York, with liberty to call at Cherbourg, *or* and
127 Queenstown, one case automobile being marked and numbered as in the margin, weight, measure, gauge, quality, condition, contents, and value unknown, and to be delivered in like good order and condition at the Port of New York, (or so near thereto as she may safely get) unto American Express Co. or to *his* or their assigns, *he* or they paying freight, primage, and charges as per margin (at the current rate of Exchange for Bankers' Bills at sight on London, on the day of the Ship's arrival). General Average payable according to the custom of the Port of destination or of the Port where the voyage ends, or according to York-Antwerp Rules, at the Carrier's option.

The responsibility of each Carrier is limited to its own Line.

It is mutually agreed that the Ship shall have liberty to sail without pilots; to tow and assist ves-els in distress; to deviate for the purpose of saving life or property; that the carrier shall have liberty to convey goods in lighters or steam tenders to and from the ship, whether lying in the River or in Dock, at the risk of the owners of the goods; and in case the ship shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship. The Carrier is entitled to the benefit of all liberties and exemptions provided for in the Act of Congress of the U. S. of America relating to the liability of Carriers approved the 13th February, 1893, and known as the Harter Act.

It is also mutually agreed that the Carrier shall not be liable for loss, damage or delay occasioned by causes beyond his control, by the perils of the sea or other waters; by fire from any cause or wheresoever occurring, by barratry of the master or crew;
128 by enemies, pirates or robbers; by thieves, whether in the employment of the Carrier or not; by arrest and restraint of princes, rulers or people, riots, strikes, lock-outs or stoppage of labour; by explosion, bursting of boilers, breakage of shafts or any latent defect in hull or machinery or appurtenances; by collisions, stranding, risks of lighterage, or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default or error in judgment of pilot, master, mariners, lightermen, stevedores, or other servants of the Carrier, or persons for whose acts he would otherwise be responsible, whether on any wharves, or on the steamship herself, or on any other vessel, lighter or craft, not resulting however, in any case, from want of due diligence by the owners of the ship or any of them, or by the Ship's Husband or Manager, or by unseaworthiness of the Ship or Craft at the time of shipment or the commencement or any period of the voyage (provided the Owners have exercised due diligence to make the vessel seaworthy); nor by decay, heating, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, damage done by rats or other vermin, or any loss or damage arising from the nature of the goods, or the insufficiency of packages or wrappers; nor for land damage, nor for the obliteration, errors, insufficiency or absence of marks, brands and numbers, address or description; nor for risk of craft, hulk or transhipment; nor for any loss or damage caused by the prolongation of the voyage. If the owner shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned, equipped and supplied, it is hereby agreed that, in the case of danger, damage or disaster resulting from faults or errors in navigation, or in the man-
129 agement of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or the unseaworthiness was not discoverable by the exercise of due diligence), the consignees or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such danger, damage or disaster had not resulted from, or been occasioned by, faults or errors in navigation or in the management of the vessel, or any latent defect or unseaworthiness.

1. It is also mutually agreed that the value of each package shipped hereunder does not exceed $100, or its equivalent in English currency on which basis the freight is adjusted, and the Carrier's liability shall in no case exceed that sum, unless a value in excess

thereof be specially declared, and stated herein, and extra freight as may be agreed on paid. The Carrier is further entitled to the full benefit of all exemptions from liability provided in Sections 4281 and 4282 of the United States Revised Statutes.

2. Also, that Shippers shall be liable for any loss or damage to Ship or Cargo caused by inflammable, explosive, dangerous or injurious goods, shipped without full disclosure of their nature, whether such Shipper be Principal or Agent; and such goods may be thrown overboard or destroyed at any time without compensation.

130 3. Also, that the Shipowner is not liable for any claim notice of which is not given before the removal of the Goods; nor for any claim for loss, short delivery, damage, or detention of goods, unless the ground of claim shall wholly arise while the goods are in the actual custody of the Shipowner; nor is the Shipowner in any case liable beyond the Invoice or declared value of the Goods, whichever shall be least. It is expressly stipulated that the Goods and Merchandise mentioned in this Bill of Lading, whilst being transhipped or awaiting shipment on any quay or lighter in Southampton, or elsewheresoever, and also so soon as they are discharged over the Ship's side, shall be at the sole risk of the Shipper or Consignee. Goods which may requore to be forwarded by Rail, Steamship, Lighter, or otherwise to their port of shipment or to their destination from the Ship's port of discharge shall be so forwarded at Merchant's risk, subject to the ordinary conditions of carriage of such Railway, Steamship, or other Carrier, or subject to any special terms required by them.

4. The Carrier shall have a lien on the goods for all freight, demurrage, damages, for detention, primage and charges, including land and water transport, charges incurred before shipment, and also for fines or damages, which the Ship or its Owners may incur, or suffer, by reason of the incorrect or insufficient marking, numbering, or addressing of packages, or description of their contents or the dangerous or injurious nature thereof.

5. Also, that in case the ship shall be prevented from reaching her destination by Quarantine, the Carrier may discharge the goods into any Depot or Lazaretto, and such discharge shall be deemed a final delivery under this Contract, and all the expenses

131 thereby incurred on the goods shall be a lien thereon.

6. The goods to be taken from alongside by the Consignee immediately the vessel is ready to discharge, without reference to the state of the weather, or otherwise they will be landed and deposited at the expense of the Consignee and at his risk of Fire, loss or injury, on the Dock or Wharf, or into Hulk or Lighter, or in the Warehouse provided for that purpose, or sent to the Public Store, as the Collector at the Port of New York shall direct, and when deposited in the Warehouse, to be subject to storage, the Collector of the Port being hereby authorised to grant a general order for discharge immediately after arrival of the Ship.

7. Also, that in case the whole or any part of the Goods specified herein be prevented by any cause from going in said Steamer, the Carrier is not to be under any liability if he forward them by suc-

ceeding Steamers, whether of this Line, or any Steamer running in connection therewith.

8. Also, that the only condition on which Glass, Earthenware, China, Marble, Castings or other goods of a fragile character will be carried, is that the Carrier shall not be held liable for any loss or injury which may occur whether from negligence or any other cause whatever.

9. Also, that full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

10. Also, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the Carrier shall be entitled to recover the difference from the Shipper.

132 11. Also, that this Bill of Lading, duly endorsed, be given up to the Ship's Consignee in exchange for Delivery Order.

12. Also, that Freight Prepaid will not be returned, Ship or Goods lost or not lost.

13. Also, the Carrier is not to be liable for loss, injury or detention of packages, intended for different Consignees, but made up into one parcel, unless the contents and value of each separate package be herein stated, and full freight paid on each package.

Except as above otherwise provided, the liability of the Carrier, under this Bill of Lading, shall be governed by the law of England, with reference to which law this contract is made.

And finally, in accepting this Bill of Lading, the Shipper, Owner, and Consignee of the Goods, and the holder of the Bill of Lading agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such Shipper, Owner, Consignee or Holder.

In Witness Whereof, the Master or Agent of the said Ship, hath affirmed to one Bill of Lading, of this tenor and date, numbered consecutively, one of which being accomplished and given up to the Carrier, the others to stand void.

Dated at Southampton, this Dec. 24 1910.

A. W. SMITH.

133 LIBELLANT'S EXHIBIT 2.

Direct Examination of William Thomas Potts, by Mr. Taylor, in Deposition Taken on Behalf of Respondent James C. Fargo.

"Q. Can you, by the examination of the Respondent Fargo's "Exhibit 2 (Libellant's Exhibit IV attached to agreed statement of "facts) for Identification state what the rate actually charged upon "Mr. Reid's automobile was from Southampton to New York?

"A. 25 shillings and 10% ton of 40 cubic feet.

"Q. Making the total freight what?

"A. £22.12 shillings.

"Q. Upon ad valorem basis, assuming the automobile to be worth

" £800, what ad valorem would have been necessary to yield that " freight rate?

"Mr. Beecher: Objected to as immaterial, irrelevant and incompetent.

"A. Well, nearly 3%. 3% would be £24.

"Q. And you have stated that you have never known an ad valorem freight rate in excess of one and one-tenth per cent?

"A. Yes."

RESPONDENT JAMES C. FARGO'S EXHIBIT A.

(See Schedule of Freight Rates attached as Exhibit A to interrogatories propounded by respondent James C. Fargo, etc., to International Mercantile Marine Company at page 33.)

134 RESPONDENT JAMES C. FARGO'S EXHIBIT B—BILL OF LADING.

(See Libellant's Exhibit I, Exhibit IV attached thereto, page 125.)

RESPONDENT JAMES C. FARGO'S EXHIBIT C—SHIPPER'S DECLARATION.

(See Libellant's Exhibit I, Exhibit II attached thereto, page 111.)

RESPONDENT JAMES C. FARGO'S EXHIBIT D—INSTRUCTIONS FOR SHIPMENT OF AUTOMOBILES.

(See Libellant's Exhibit I, Exhibit III attached thereto, page 113.)

135 *Stipulation.*

United States District Court for the Southern District of New York.

OGDEN M. REID, Libellant,
against
JAMES C. FARGO, as President of the American Express Company; International Mercantile Marine Company, Impleaded, and T. Hogan & Sons, Incorporated, Impleaded, Respondents.

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto, that the foregoing record on appeal contains all the evidence and all the proceedings as agreed upon and may be certified by the Clerk of this Court and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Second District.

Dated September —, 1913.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.

CARTER, LEDYARD & MILBURN,
Proctors for Respondent James C. Fargo.

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent International Mercantile Company.

O'BRIEN, BOARDMAN & PLATT,
Proctors for Respondent T. Hogan & Sons, Incorporated.

136 *Form of Certificate Delivered by Clerk.*

United States District Court for the Southern District of New York.

OGDEN M. REID, Libellant,
against
JAMES C. FARGO, as President of the American Express Company; International Mercantile Marine Company, Impleaded, and T. Hogan & Sons, Incorporated, Impleaded, Respondents.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this — day of —, in the year of our Lord one thousand nine hundred and —, and of the Independence of the said United States the one hundred and thirty.

—— ——, *Clerk.*

137 *Stipulation.*

United States District Court for the Southern District of New York.

OGDEN M. REID, Libellant,
against
JAMES C. FARGO, as President of the American Express Company; International Mercantile Marine Company, Impleaded, and T. Hogan & Sons, Incorporated, Impleaded, Respondents.

It is hereby stipulated and agreed by and between the proctors for the parties herein that any exhibits not printed in the record herein may be used for the purposes of this appeal as though the same had been printed in the record.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Libellant.
CARTER, LEDYARD & MILBURN,
Proctors for Respondent James C. Fargo.
BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for Respondent International Mercantile Company.
O'BRIEN, BOARDMAN & PLATT,
Proctors for Respondent T. Hogan & Sons, Incorporated.

138 United Sttates Circuit Court of Appeals for the Second Circuit, October Term, 1913.

No. 162.

OGDEN M. REID, Libellant-Appellee,
vs.
JAMES C. FARGO, as President, etc., Respondent-Appellee; The International Mercantile Marine Company, Impleaded, Respondent-Appellee; T. Hogan & Sons, Incorporated, Impleaded, Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Ward and Rogers, Circuit Judges.

Argued March 3, 1914; Decided April 7, 1914.

WARD, *Circuit Judge:*

Ogden M. Reid delivered an automobile to the American Express Company at London to be packed and forwarded by it to Southampton by rail, and there delivered to the Steamship Minnetonka of the International Mercantile Marine Company for transportation to New York. The Express Company did so and received the com-
139 pany's usual bill of lading to its order. Upon arrival of the steamer T. Hogan & Sons, stevedores, under contract with the Steamship Company, discharged the cargo. The case in the hold was put in a rope sling and hoisted to the deck of the steamer, and while being carried off to the pier by a Burton fall the sling broke and the case fell into the river. Reid filed a libel against the Express Company, an unincorporated association of which the respondent Fargo is president, to recover the damages. The Express Company, by petitions under the 59th Rule in Admiralty, brought in the Steamship Company and T. Hogan & Sons as parties.

The District Judge filed no opinion but directed a decree in favor of the libellant against T. Hogan & Sons in the first instance and for any deficiency not collected of them, against the American Express Company and dismissed the petition against the Steamship Company. T. Hogan & Sons alone appeal from the decree.

New parties brought into a suit under the 59th Rule are treated as if they had been originally proceeded against and must answer the libel. It is the law of this circuit that an appeal in admiralty vacates the decree below and the cause is tried anew in this court. Other parties without appealing may have new relief. Munson Line vs. Miramar Steamship Co., 167 F. R., 960.

T. Hogan & Sons had no contract with the libellant and are only liable for negligence. The mere breaking of the rope does not establish negligence, but it does require them to give an explanation which will discharge them of negligence because the case and the

steam winches and the whole operation were in their exclusive control. They have shown that the rope was furnished to them by the Steamship Company, that it was new, free from any external defects, of a size sufficient for the load, was slung in the usual way and that the case was raised in the usual manner and without any jerk or sudden strain. We think it follows that the accident was not caused by their negligence, but must have been due to a latent defect. The rope belonged to the Steamship Company and went back into its possession after the accident. It has not been pro-
140 duced because it has been lost. We think that T. Hogan & Sons are not liable to the libellant.

We have next to inquire whether the Express Company is liable. It was not an insurer nor a carrier, but a mere forwarding agent. It was not liable for any negligence of the Steamship Company or of the stevedores. The libellant suggests as a ground of liability that having notice that the car was worth £800 it should have arranged with the Steamship Company to carry it at that value. No such ground of liability is charged in the libel. On the contrary, it proceeds upon an allegation that the Express Company agreed to safely carry the car to New York and there deliver it to the libellant. No such agreement or relation has been proved. Shippers almost invariably accept the carrier's ordinary bill of lading and in the absence of any evidence we are not disposed to imply as matter of law a duty on the part of the Express Company to do otherwise.

Finally we come to the Steamship Company. It did stand in relation to the libellant of carrier of his car and was an insurer except as to the act of God, the public enemy and causes excepted in the bill of lading. As we find no exception covering this loss, the Steamship Company must be held liable. Its bill of lading, however, contained the following clause:

"1. It is also mutually agreed that the value of each package shipped hereunder does not exceed $100, or its equivalent in English currency on which basis the freight is adjusted, and the C... rier's liability shall in no case exceed that sum, unless a value in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid. The Carrier is further entitled to the full benefit of all exemptions, from liability provided in Sections 4281 and 4282 of the United States Revised Statutes."

Similar stipulations are held binding in this court, George N. Pierce Co. v. Wells Fargo Co., 189 F. R. 561. But the proctors for the Express Company contend that as the freight on the car
141 was calculated on measurement and not on value, this stipulation does not apply. Freight rates on a package and the amount an owner may recover in case of loss are two entirely different things. The parties may agree that for a higher freight the package shall be valued for purposes of recovery at over $100. In this case they have agreed that the value of the car is $100 and that must be taken to be its true value for purposes of the contract of carriage. Of course the stipulation would not apply if the car had been charged an ad valorem freight on a value over that amount. But in this case the freight was charged on measurement. The decree is

reversed and the court below directed to enter a decree dismissin the libel against the American Express Company with costs of bot courts and dismissing the petition bringing in T. Hogan & Son with costs of both courts against the American Express Company an awarding the libellant the sum of $100 to be paid by the Steamshi Company with costs of both courts to the Express Company.

F. H. Platt, for the Appellant.

W. F. Taylor, for Fargo.

N. B. Beecher, for International Mercantile Marine Company.

H. S. Harrington, for the Libellant.

142 United States Circuit Court of Appeals for the Second Circui

OGDEN M. REID, Libellant-Appellee,

vs.

JAMES C. FARGO, as President of American Express Company, Re spondent-Appellee; International Mercantile Marine Company Impleaded, Respondent-Appellee, and T. Hogan & Sons, Incor porated, Impleaded, Respondent-Appellant.

The respondent International Mercantile Marine Company hav ing in its answer filed March 1, 1912, offered to allow a decree to b taken against it for the sum of $100, in accordance with Rule 3 of this court, and the attention of the Circuit Court of Appeals no having been called to this offer.

It is hereby stipulated by the proctors for the respondent Inter national Mercantile Company and the respondent James C. Fargo that the mandate of this court shall award to James C. Fargo, agains the International Mercantile Marine Company costs to the date o said offer, March 1 1912, and shall award to the International Mer cantile Marine Company against James C. Fargo, costs from sai date.

Dated, New York, April 16, 1914.

CARTER, LEDYARD & MILBURN,
Proctors for Respondent-Appellee James C. Fargo.

BURLINGAME, MONTGOMERY & BEECHER,
Proctors for Respondent-Appellee International Mercantile Marine Company.

143 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 17th day of April one thousand nine hundred and fourteen.

Present:

Hon. E. Henry Lacombe.
Hon. Henry G. Ward,
Hon. Henry Wade Rogers,
Circuit Judges.

OGDEN M. REID, Libellant-Appellee,
vs.
JAMES C. FARGO, as President, etc., Respondent-Appellee; The International Mercantile Marine Company, Impleaded, etc., Respondent-Appellee, and T. Hogan & Sons, Incorporated, Impleaded, etc., Respondent-Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is reversed and the court below directed to enter a decree dismissing the libel against the American Express Company with costs of both courts, and dismissing the petition bringing in T. Hogan & Sons, with costs of both courts against the American Express Company, and awarding the libellant the sum of $100, to be paid by the Steamship Company, with costs to be adjusted in accordance with the stipulation of the parties.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.
H. G. W.

144 Endorsed: United States Circuit Court of Appeals, Second Circuit. O. M. Reid vs. J. C. Fargo et al. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 21, 1914. William Parkin, Clerk.

145 I vote to deny:—

H. G. W.
H. W. R.

United States Circuit Court of Appeals, Second Circuit. Filed Apr. 28, 1914. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

OGDEN M. REID, Libellant-Appellee,
against
JAMES C. FARGO, as President of American Express Company, Respondent-Appellee; The International Mercantile Marine Company, Impleaded, Respondent-Appellee, and T. Hogan & Sons, Incorporated, Impleaded, Respondent-Appellant.

Petition of Ogden M. Reid for a Rehearing.

To the Honorable the Judges of the Circuit Court of Appeals for the Second Circuit:

The petitioner herein respectfully prays for a re-hearing of this case on the following grounds:

Upon the oral argument herein, the advocate for the respondent, James C. Fargo, was asked by his Honor, Judge Lacombe, whether he contended that even as a forwarding agent the Express Company had carried out its contract by delivering libellant's automobile to the Steamship Company upon an agreed valuation of $100, where it appeared that the value of the automobile had been de-
146 clared to the Express Company at £800. The writer's recollection is that the advocate for the Express Company stated in open Court, in reply to Judge Lacombe's question, that the contention of the Express Company was that the $100 limitation clause was not applicable in this case, and that, therefore, they had discharged their contract. Judge Lacombe then rejoined that the Court would hear argument with respect to the validity of the $100 limitation, but repeated the inquiry, whereupon Mr. Taylor replied. Although the writer cannot recall the exact words used, he is firm in the belief that Mr. Taylor's reply constituted an admission that if the $100 limitation clause were valid, the Express Company, even as a mere forwarding agent, would be liable to the libellant for failure to declare the value of the car to the Steamship Company.

The advocate for the petitioner is extremely loath to attempt to state what took place upon the oral argument herein, but as he believes that the other counsel engaged in the case gathered the same impression, it is thought proper to call the Court's attention to the happening, especially in view of the fact that upon rising to address the Court on behalf of the appellee, Ogden M. Reid, the writer referred to what he considered the admission of Mr. Taylor and said that in view of that admission he presumed that it would be unnecessary for him to discuss the question—a view in which he understood the Court to join, as Judge Lacombe immediately asked the advocate for Mr. Reid for an expression of his view of the liability of the appellant Hogan—his Honor, Judge Lacombe distinctly stating that he asked the question, as Mr. Reid had no interest therein.

The advocate for the petitioner has never filed a petition for a rehearing in any Court, and earnestly trusts that the foregoing reference to happenings upon the oral argument, as he recalls them, is within the proprieties governing such an application as this.

147 I.

At the time of the filing of libel herein the only document which Mr. Reid, the libellant, had, was a brief and plain receipt signed by the Express Company and acknowledging receipt of the automobile for transportation from London to New York.

Upon the filing of the Express Company's answer, to which was annexed as an exhibit and as part thereof a copy of the shipping instructions filled in on a printed form and signed by Mr. Reid's chauffeur, Thomas Stevens, we became aware that the plain receipt given at the time the car was actually shipped would probably be treated and read in connection with the shipping instructions which had been signed some days before the actual shipment of the car, and of which no copy had been given to Mr. Reid's agent, Stevens. We were quite prepared to agree that under the conditions of the shipping instructions, the American Express Company was a mere forwarding agent as distinguished from a common carrier, and thereafter no effort was made by us to offer proof with respect to the status of the Express Company, as we were entirely willing to rest upon the theory pleaded in their answer.

In the admiralty, of course, the rule as laid down by the Supreme Court of the United States in The Gazelle and Cargo, (128 U. S. 474, at page 487) is as follows:

"In the courts of admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance, or of departure in pleading, as at common law; and if a libellant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appro-
148 priate relief, (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded), the Court may award any relief which the law applicable to the case warrants. Duponta v. Vance, 19 How., 162; The Syracuse, 12 Wall., 167; Dexter v. Munroe, 2 Sprague, 39; The Cambridge, 2 Lowell, 21. Decree affirmed."

In the light of this rule we respectfully urge that Mr. Reid was entitled to recover against the American Express Company by reason of the fact that the Express Company failed to carry out its contract as a forwarding agent.

In the opinion of this Court herein, it is said:

"Shippers almost invariably accept the carrier's ordinary bill of lading, and in the absence of any evidence we are not disposed to imply as matter of law a duty on the part of the Express Company to do otherwise."

It is respectfully submitted that there was no proof in the record that shippers almost invariably accept the carrier's bill of lading with a limitation of liability to an agreed nominal amount, and we respectfully submit that even if it were the fact that shippers almost invariably accept such bills of lading (without regard to the actual value of the property shipped), such fact is not one of which the Court should take judicial notice. As a matter of fact, however, it is believed that in recent years—since the validity of limitations

of the character here in question has become more generally known—shippers very frequently declare higher values and pay higher rates in order to be adequately protected in the event of loss. Many such instances have come to the attention of the writer in his own experience, and it is really believed that, as a matter of fact, people who ship automobiles almost invariably declare their actual values. We respectfully point out, however, that without regard to the practice of others, this particular libellant did declare the value
149 of his automobile on delivering the same to the forwarding agent.

In conclusion it is respectfully and earnestly urged that the present result of this litigation is an extreme hardship upon the libellant, who delivered his valuable automobile to the Express Company and paid freight thereon amounting to $150—distinctly declaring its value at £800 Sterling. The Express Company received $150 as its charge for forwarding services, and turned the automobile over to the Steamship Company under an agreement that the same was worth only $100. We respectfully submit that if one person receives from another an article agreed to be worth $4,000 and contracts for a consideration to deliver that article to a third person for transportation or for any other purposes, there is, in fact, a plain breach of contract if the person to whom the property is so entrusted delivers it to a third party under a valid agreement that instead of being worth $4,000 it is worth only $100. In turning over an article worth $4,000 under an agreement that it is worth only $100, the forwarder simply converts the subject of his contract. There is, of course, a vital and controlling difference between the case of a shipper who himself is pleased to be careless with his own property (as he has a perfect right to be) and the case of a commercial agent, who has contracted, for a valuable consideration, to forward a shipper's property.

In view of the circumstances under which the advocate for the petitioner was not heard by this Court upon the oral argument, your petitioner respectfully prays this Honorable Court that a reargument of this case be granted.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Ogden M. Reid.

HOWARD S. HARRINGTON, *Advocate.*

150 I hereby certify that the foregoing petition, in my opinion, is true in point of fact and well founded in point of law and is not interposed for the purpose of delay.

HOWARD S. HARRINGTON,
Advocate for Petitioner.

April 27, 1914.

151 At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms, in the Post Office Building, City of New York, on the 8th day of May, 1914.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

OGDEN M. REID, Libellant-Appellee,
vs.
JAMES C. FARGO, as President, etc., Respondent-Appellee; International Mercantile Marine Company, Impleaded, Respondent-Appellee; T. Hogan & Sons, Inc., Impleaded, Respondent-Appellant.

A petition for a rehearing having been filed herein by counsel for the libellant;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

H. W. R.

Endorsed: United States Circuit Court of Appeals Second Circuit. O. M. Reid v. James C. Fargo et al. United States Circuit Court of Appeals Second Circuit. Filed May 8, 1914. William Parkin, Clerk.

152 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 151 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Ogden M. Reid against James C. Fargo, as President, etc., et al., as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of May, in the year of our Lord One Thousand Nine Hundred and fourteen and of the Independence of the said United States the One Hundred and thirty-eighth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

153 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which T. Hogan & Sons, Incorporated, is Appellant, and Ogden M. Reid, James C. Fargo, as President of American Express Company and the International Mercantile Marine Company are appellees which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

154 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the ninth day of December, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

155 [Endorsed:] File No. 24433. Supreme Court of the United States, No. 689, October Term, 1914. Ogden M. Reid, Petitioner, vs. James C. Fargo, as President of The American Express Co., et al. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 22, 1914. William Parkin, Clerk.

156 Supreme Court of the United States, October Term, 1914.

No. 689.

OGDEN M. REID, Petitioner,
against
JAMES C. FARGO, as President of the American Express Company et al., Respondents.

It is hereby stipulated and agreed that the certified transcript of record filed with the petition for a writ of certiorari herein may be taken as the return to the said writ, and that a copy of this stipu-

lation may be returned by the Clerk of the United States Circuit Court of Appeals as his return to the writ of certiorari.

Dated New York, December 14th, 1914.

HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Ogden M. Reid, Petitioner.
CARTER, LEDYARD & MILBURN,
Attorneys for James C. Fargo, as President of American Express Co., Respondent.
BURLINGHAM, MONTGOMERY & BEECHER,
Attorneys for International Marine Company, Respondent.
O'BRIEN, BOARDMAN & PLATT,
Attorneys for T. Hogan & Sons, Inc., Respondent.

Endorsed: Reid vs. Fargo. Stipulation. United States Circuit Court of Appeals. Second Circuit. Filed Dec. 22, 1914. William Parkin, Clerk.

157 To the Supreme Court of the United States, Greeting:

Whereas, the record and all proceedings whereof mention is within made has been lately filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, December 22nd, 1914.

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[United States internal revenue documentary stamp, series of 1914, canceled 12/22/14. W. P.]

158 [Endorsed:] 689/24433. United States Circuit Court of Appeals, Second Circuit. Ogden M. Reid v. Jas. C. Fargo et al. Return to Certiorari.

159 [Endorsed:] File No. 24433. Supreme Court U. S., October Term, 1914. Term No. 689. Ogden M. Reid, Petitioner, vs. James C. Fargo, as President of The American Express Co., et al. Writ of Certiorari and Return. Filed December 24, 1914.

Supreme Court of the United States

October Term 1914

OGDEN H. REID

(Libelant-Appellee) Petitioner

against

JAMES C. FARGO, as President of the American Express Company

(Corporation-Appellee), Respondent

and

INTERNATIONAL MERCANTILE MARINE COMPANY, Impleaded

(Respondent-Appellee) Respondent

and

T. HOGAN & SONS, Incorporated, Impleaded

(Respondent-Appellant) Respondent

PETITION OF OGDEN H. REID FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

HOWARD S. HARRINGTON,
OSCAR R. HOUSTON,
Proctors for Petitioner.

—1914—

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

OGDEN M. REID,

(*Libellant Appellee*) *Petitioner,*

against

JAMES C. FARGO, as President of the AMERICAN EXPRESS COMPANY,

(*Respondent Appellee*) *Respondent,*

and

INTERNATIONAL MERCANTILE MARINE COMPANY, Impleaded,

(*Respondent Appellee*) *Respondent.*

and

T. HOGAN & SONS, Incorporated, Impleaded,

(*Respondent-Appellant*) *Respondent,*

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petition of OGDEN M. REID respectfully shows to this Honorable Court:—

Facts of the Case.

On December 21, 1910, Ogden M. Reid, the Petitioner, delivered his Peerless Motor Car to the American Express Company (Respondent, hereafter called the Express Company) in Lon-

don, to be forwarded to New York. In his instructions for the shipment he stated the value of the car to be £800, or about $3900, (fol. 339), and paid the Express Company's charges amounting to $150 (fol. 17). The Express Company boxed the car and shipped it on the steamer "Minnewaska," owned and operated by the International Mercantile Marine Company (Respondent, hereafter called the Steamship Company) (fol. 324). The Express Company, without the knowledge or authority of Mr. Reid, accepted a bill of lading from the Steamship Company which provided among other things, as follows:

> "It is also mutually agreed that the value of each package shipped hereunder does not exceed $100 or its equivalent in English currency on which basis the freight is adjusted, and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid" (folio 386).

The Express Company failed to declare to the Steamship Company any value for the car.

The Express Company paid to the Steamship Company £22.12.0, or $109.61 freight (fols. 69-322). This freight was *not* in fact based on the value of the car, either the $100 valuation, or the true value, but was based exclusively on the number of cubic feet of space occupied (fol. 397). If the Express Company had declared the value of the car as £800, the freight rate would have been the same, as the Steamship Company had in force no rate based on value which could possibly have exceeded the rate actually paid (fol. 398).

The ship arrived safely at the dock in New York, and T. Hogan & Sons (Respondent, hereafter called the Stevedores), were engaged as

Stevedores in unloading the cargo. While the car was being unloaded by the Stevedores, the sling in which it was carried broke, and the car fell into the water between the vessel and the dock, and was badly damaged.

The Proceedings in the District Court.

Ogden M. Reid filed a libel *in personam* in the District Court for the Southern District of New York, against the Express Company alone (fol. 7). The Express Company by petition under the 59th Rule, brought in the Steamship Company (International Mercantile Marine Company) (fol. 34), and the Stevedores (T. Hogan & Sons) (fol. 62). All three of the respondents answered, and the case was heard on the merits before Judge Veeder. Judge Veeder entered a decree in favor of Mr. Reid for the full value of the car, as fixed by the Special Master ($2,724.40), against the Stevedores, in the first instance, with a provision that in the event and to the extent that the libellant was unable upon execution to collect the amount of the judgment against the Stevedores, he should recover it from the Express Company, (fols. 298-303). The petition bringing in the Steamship Company was dismissed without costs (fol. 291).

Judge Veeder wrote no opinion. It is clear, however, from the pleadings and from his remarks in the course of the trial, that the findings upon which this decree was founded were the following:

(1) That the Express Company was liable to Mr. Reid on its contract, either on the theory that it was negligent in failing to declare the true value of the car to the Steamship Company, or upon its liability as a common carrier.

(2) That the Express Company had no recourse

over against the Steamship Company, because the valuation clause of the bill of lading was valid. Strictly speaking, of course, on this theory the decree should have held the Steamship Company liable to the extent of $100, but as all the respondents are amply responsible, such a recovery was immaterial, and was evidently overlooked by the learned District Judge.

(3) The Express Company was entitled to recover over against the Stevedores because they were negligent in handling the car (fols. 130, 131, 229, 230), and were thus ultimately liable.

The decree, in order to avoid circuity of recovery, awarded to Mr. Reid recovery in the first instance against the Stevedores, with a right over against the Express Company (fol. 298).

Proceedings in the Circuit Court of Appeals.

The Stevedores alone among the Respondents appealed to the Circuit Court of Appeals for the Second Circuit (fol. 304). None of the other parties appealed against any part of the decree or filed assignments of error. In the briefs and oral argument in the Circuit Court of Appeals the Appellant, the Stevedores, attacked the decree solely on the ground that the evidence established no negligence on their part, and this was the principal item discussed. The Express Company argued *first*, that the Stevedores were guilty of negligence, and *second*, that the valuation provision in the bill of lading was void because the rate was not based upon such value, and the valuation was obviously a false valuation. For this reason the Express Company argued that, as it was a mere forwarding agent, and had handed over the car to a responsible steamship company, which was liable as a carrier for the full value

of the car, its (the Express Company's) full duty was done.

On this subject counsel for the Express Company said in their brief in the Circuit Court of Appeals, page 13:

> "The Court below apparently has held that the Express Company was derelict in its duty in that, although the libellant in delivering the automobile to it put a value of £800 upon it, the Express Company failed to declare the value to the Steamship Company, and thus brought into force the hundred dollar limitation clause in the Steamship's bill of lading.
>
> "The respondent Fargo will show in his next point that the hundred dollar limitation clause contained in the bill of lading has no application to this shipment. The Express Company, therefore, in failing to declare to the Steamship Company the value of the automobile did not fail in any duty which it owed to the libellant. The libellant's remedy against the Steamship Company being complete, he has no cause of action against the Express Company."

In the oral argument it was substantially conceded that Mr. Reid was entitled to recover from one of the three Respondents, the only question being as to which of the three was ultimately liable (Petition for a Rehearing, fols. 436-438).

The Circuit Court of Appeals reversed the entire judgment, holding in substance:—

(1) That the Stevedores were not shown to be guilty of negligence, and were, therefore, not liable to any one.

(2) That the Steamship Company was not liable in excess of $100, because the limitation of value in its bill of lading was valid;

(3) That the Express Company was a mere

forwarder, and that its failure to declare to the Steamship Company the true value of the car, although such value had been declared by Mr. Reid to the Express Company, was not negligence on its part. (Opinion, fols. 412-423).

Grounds upon which a writ of certiorari is asked.

The Petitioner seeks no relief in this application as against T. Hogan & Sons, the Stevedores. They are liable only for negligence, and the Petitioner concedes that the decision of the Circuit Court of Appeals on this contested question of fact need not be reveiwed by this Court.

The Petitioner, however, contends that:

(1) As the Express Company did not appeal from any part of the decree, its liability to the Libellant under the decree was not open in the Circuit Court of Appeals, and the Circuit Court of Appeals had no power to reverse the decree awarding Mr. Reid full recovery against the Express Company.

(2) If this Court should hold that the liability of all parties could be established *de novo* in the Circuit Court of Appeals then the Circuit Court of Appeals should have held, either (1) that the limitation of value in the bill of lading was void because the $100. valuation for an automobile was obviously a false valuation and the rate was, in fact, not based on it, and, therefore, Mr. Reid was entitled to a full recovery from the Steamship Company, or (2) if the valuation was valid, then that the Express Company was guilty of negligence and violated its plain duty as a forwarding agent in failing to declare to the Steamship Company the true value of the car which had previously been declared to the

Express Company by Mr. Reid, and that the Express Company was liable to Mr. Reid for this dereliction of duty.

Your Petitioner will present in connection with this petition a brief discussing more fully the contentions above stated, with the citation of authorities.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and to send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings of said Circuit Court of Appeals in this case, which was entitled in that Court: *"Ogden M. Reid, Libellant, against James C. Fargo, as President of the American Express Company, Respondent, and International Mercantile Marine Company and T. Hogan & Sons, Inc., Impleaded, Respondents,"* to the end that said cause may be reviewed and determined by this Court, as provided by law, and that your Petitioner may have such other and further relief in the premises, as to this Court may seem just, and that the said judgment of the said Circuit Court of Appeals may be modified by this Honorable Court.

OGDEN M. REID,
Petitioner,
By HOWARD S. HARRINGTON.

STATE OF NEW YORK }
County of New York } ss.:

HOWARD S. HARRINGTON, being duly sworn, deposes and says, that he is one of the Proctors for Ogden M. Reid herein; that he participated in the preparation of the foregoing petition, and knows the contents thereof, and that the allegations therein are true as he verily believes.

HOWARD S. HARRINGTON,

Subscribed and sworn to before me this 5th day of November, 1914.

Russell H. Porter,
Notary Public, New York County.

WE HEREBY CERTIFY that we have examined the foregoing petition and in our opinion it is well founded and is entitled to the favorable consideration of the Court.

HOWARD S. HARRINGTON.
OSCAR R. HOUSTON.
Counsel.

Sirs:

TAKE NOTICE that we shall submit the foregoing petition for a writ of certiorari to the Supreme Court of the United States at the opening of the Court on Monday, November 30, 1914.

Dated, November 5th, 1914.

Yours, etc.,
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner.

To:—

Carter, Ledyard & Milburn, Esqs.,
Proctors for Respondent, Fargo.

Burlington, Montgomery & Beecher, Esqs.,
Proctors for Respondent,
International Mercantile Marine Company.

O'Brien, Boardman & Platt, Esqs.,
Proctors for Respondent,
T. Hogan & Sons, Inc.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

OGDEN M. REID,
(*Libellant-Appellee*) *Petitioner*
against
JAMES C. FARGO, as President of the AMERICAN EXPRESS COMPANY
(*Respondent-Appellee*) *Respondent*
and
INTERNATIONAL MERCANTILE MARINE COMPANY, Impleaded,
(*Respondent-Appellee*) *Respondent*
and
F. HOGAN & SONS, Incorporated, Impleaded,
Respondent-Appellant) *Respondent*

BRIEF IN SUPPORT OF THE PETITION OF OGDEN M. REID FOR A WRIT OF CERTIORARI.

The facts of the case, which are somewhat lengthy, are fully set forth in the petition. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 213 Fed. 771.

I.

As the Express Company did not appeal from so much of the decree of the District Court as held it liable to Mr. Reid, it could not be heard in the Circuit Court of Appeals to contest its liability, and the Circuit Court of Appeals had no power to reverse this portion of the decree.

The stevedores appealed from the decree of the District Court and filed assignments of error all of which were directed solely to the point that T. Hogan & Sons were not liable for the damage (fol. 310). No notice of appeal or assignments of error were filed by any other party. The Circuit Court of Appeals reversed the decree as between Mr. Reid and the express Company on the following theory:

> "It is the law of this Circuit that an appeal in Admiralty vacates the decree below, and the cause is tried anew in this Court. Other parties without appealing may have new relief, *Munson Line v. Miramar Steamship Co.*, 167 Fed. Rep., 960."

The case of *The Miramar* (also decided by the Circuit Court of Appeals for the Second Circuit) constituted a distinct departure from the pre-existing rule. Prior to that decision it had been settled law, both in this Court and in all of the Circuits where the question had arisen that in admiralty a party who had not appealed could be heard only in support of the decree, and could not obtain a decree in the Appellate Court more favorable to him than the decree in the District Court.

M'Donough vs. Dannery, 3 Dall, 188, 198;

Canter vs. American Ins. Co., 3 Pet., 307;
Stratton vs. Jarvis, 8 Pet., 4;
The William Bagaley, 5 Wall., 377;
The Quickstep, 9 Wall., 665;
The Maria Martin, 12 Wall., 31;
The Mabey, 13 Wall., 738;
The Merrimac, 14 Wall., 199;
The Mabey & Cooper, 14 Wall., 204;
The D. R. Martin, 91 U. S., 365;
The Stephen Morgan, 94 U. S., 599;
Cherokee Nation vs Blackfeather, 155 U. S., 218, 221;
Airey vs. Merrill, 2 Curt., 8, F. C. No. 115;
The Peytona, 2 Curt., 21; F. C., No. 11,058;
Allen vs. Hitch, 2 Curt., 147; F. C. *No.* 224;
The Alonzo, 2 Cliff., 548; F. C. No. 2223;
The Roarer, 1 Blatch, 1; F. C., No. 11, 876;
The Maggie P, 25 Fed., 202;
The Galileo, 29 Fed., 538;
Shaw vs. Folsom, 40 Fed., 511;
The F. W. Vosburg, 50 Fed., 239; I C. C. A. 508;
The Umbria, 59 Fed., 489; 8 C. C. A. 194;
The J. J. McCarthy, 61 Fed., 516;
The Indrani, 101 Fed., 596;
Ronalds vs. Leiter, 109 Fed., 905;
The Atlantis, 119 Fed., 568; 56 C. C. A. 134;
Leary vs. Talbot, 151 Fed., 355;
Vaccarezzo vs. 567,000 Gallons of Oil, 161 Fed., 543.

It is true that a writ of certiorari was refused

in *The Miramar,* but this may well have been because of the very small amount involved, $204.52. *The Miramar* has not been followed in any other Circuit, so far as we have been able to discover, and it remains an isolated decision.

Under these circumstances, it is respectfully submitted that the doctrine of *The Miramar* is not foreclosed in this Court, but is open to reconsideration.

Even if the rule of *The Miramar* is sound, the present case is a wholly unwarranted extension of that rule.

The present case involves in substance, three distinct controversies consolidated for trial under the 59th Admiralty Rule. The libellant's right against each of the respondents was complete in itself and quite independent of his rights against either of the other respondents. Thus, Mr. Reid's right against the Express Company depended upon whether or not it had been guilty of negligence in performing its written contract with him whereby it undertook to transport or forward the car. Mr. Reid's rights against the Steamship Company depended upon the validity of the released valuation clause of its bill of lading issued to the Express Company, and Mr. Reid's rights against the stevedores depended upon whether or not they had been guilty of negligence in handling the car. Mr. Reid could have sued any one of the three either in admiralty or at law, and such a suit could have been determined without bringing in any other parties. The present case is quite analagous to salvage proceedings or proceedings for the limitation of a shipowner's liability under the statute, in that it is a case where an Admiralty court has peculiar power to bring separate controveries together in order to simplify trials and shorten litigation.

The present case is, therefore, identical in principle with *Henderson vs. Kanawha Dock Co., The Keystone State*, 185 Fed., 781; 107 C. C. A. 581. This was a proceeding in Admiralty begun by the filing of a libel for repairs to the Keystone State. The ship was sold by the Marshal and thereafter claims were filed by the mortgagee and also by the master for wages. The District Court gave the libellant priority in the distribution of the fund and the mortgagee appealed from its decree, but the Captain filed no appeal. The Circuit Court of Appeals for the Fourth Circuit, after disposing of the appeal of the mortgagee on the merits, continued:—

> "One other matter remains to be disposed of. J. B. Demere filed a claim below for $1,350 for wages as master. The special commissioner disallowed this claim on the ground that the master has no lien *in rem* for his wages. Demere did not except to the report. He did not appeal from the decree confirming it. He now files a brief asking that this court decree that under the law of Pennsylvania he has a maritime lien on the fund for three months' wages at $150. a month. He says that the fact that he did not except to the special commissioner's report or appeal from the order of the court below is immaterial. He argues that the appeal of the mortgagee brings the whole case up to be here heard and decided *de novo*. He relies upon *Irvine v. The Hesper*, 122 U. S., 256, 7 Sup. Ct., 1177, 30 L. ed., 1175; *The San Rafael*, 141 Fed., 270, 72 C. C. A., 388; *Munson S. S. Line v. Miramar S. S. Co.*, 167 Fed., 960, 93 C. C. A., 360.
>
> "Those authorities have no reference to such a case as his. It is in effect ruled by *The Dove*, 91 U. S., 384; 23 L. Ed., 354. There the Supreme Court held that an appeal from a decree passed upon a libel did not bring

> up for review a decree dismissing a cross-libel, when the latter decree had not been appealed from. Mr. Justice Clifford pointed out that the appeal brought up all the issues raised by the libel, so that they could be tried anew. The libellant might be awarded more or less than he had been given below, or his libel might be dismissed altogether. Affirmative relief, however, could not be given the respondent, because there was no case asking for it before the court. The libel and the cross-libel were separate proceedings. They are usually consolidated for the purposes of convenience, but they are logically distinct. In this case the claim of the master raised a distinctly separate issue, having nothing whatever to do with the controversy between the appellant and the appellee. It is the dispute between them which the appellant's appeal may require us to try *de novo*. It brings up no other controversies. *The John and Winthrop* (C. C. A.), 182 Fed., 380."

The John and Winthrop, 182 Fed., 380; 106 C. C. A., 1, was a joint libel by the crew for wages and for breach of their contract of employment. The District Court entered a decree awarding the crew wages but denying them damages for breach of contract. The owners of the ship appealed but the seamen did not. The Circuit Court of Appeals for the Ninth Circuit said:

> "Had the appellees desired the review of the decree with respect to the causes of action alleging breach of contracts prior to August 3, 1908, they should have prosecuted an appeal from the decree upon that ground, and under the rule they would have been required to bring up all the testimony and other proofs adduced in the cause relating to such causes of action. In the absence of such a record we cannot review the decree with respect to the causes of action charging breach of contracts prior to August 3, 1908.
>
> "The case comes under the rule declared

in *Oliver v. Alexander,* 6 Pet., 143; 8 L. Ed., 349, where the Supreme Court said:

> " 'The whole proceeding, therefore, from the beginning to the end of the suit, though it assumes the form of a joint suit, is, in reality, a mere joinder of distinct causes of action, by distinct parties, growing out of the same contract. * * * The claim of each seaman is distinct and several; and the decree upon each claim is, in like manner, distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another; for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners or other respondents is the sum or value of his own claim, without any reference to the claims of others.'

"In *The Columbia,* 73 Fed., 226, 235; 19 C. C. A., 436, 445, this court applied this rule in a proceeding for the limitation of liability of an owner of a vessel under this statute with this remark:

> " 'The proceedings here in question are quite analagous to joint suits for seamen's wages and to the practice in cases of salvage.'

"The rule referred to in the case of *The San Rafael,* 141 Fed., 270; 72 C. C. A., 388, 'that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court and that the case is tried *de novo* in the Circuit Court,' is, therefore, not applicable to this case."

It is submitted that the decision in the present case is inconsistent with the two decisions in the Fourth and Ninth Circuits quoted above. The controversy relates to an important matter of practice, with respect to which the determination of this Court is greatly to be desired.

II.

The merits of the case.

Mr. Reid took every precaution in making the shipment: he declared the full value of the car to the Express Company, the only Company connected with the transportation with which he had any dealings, and he paid the highest freight rate chargeable for automobiles, no matter what their value. It seems intolerable that a Court should hold that he is nevertheless barred from all redress for the practical destruction of the car. Such a result was reached by the Circuit Court of Appeal by holding, *first*, that the released valuation clause in the bill of lading was valid, and *second*, that the Express Company was not negligent in failing to declare the true value of the car and thereby avoiding the released valuation clause.

It is submitted that these two conclusions are mutually inconsistent, and that one or the other must fall.

1. It was shown affirmatively that the rate charged by the Steamship Company for transportation of the automobile was, in fact, not based at all on the value of the car, but was based exclusively on the number of cubic feet of space occupied (fol. 397), and that if the Express Company had declared the value of the car at £800, the freight rate would have been the same, as the Steamship Company had in force no rate based on value which could possibly have exceeded the rate actually paid (fol. 398). Furthermore, a valuation of $100 on an automobile is obviously an arbitrary valuation, and can not be, in fact, an agreed valuation fairly entered into. The validity of this clause presents questions similar to those in the case of *George N. Pierce v. Wells*

Fargo Company, 189 Fed., 561, in which a writ of certiorari was granted, 223 U. S., 717. That case was argued in this Court in December, 1913, and the case has been restored to the calendar for reargument at the present term, and is now No. 14, October Term, 1914.

2. If the released valuation clause in the present case be valid, then it is submitted it necessarily follows that the Express Company was negligent in failing to declare the true value of the car to the Steamship Company. The Circuit Court of Appeals said of this contention:

> "Shippers almost invariably accept the carrier's ordinary bill of lading, and in the absence of any evidence we are not disposed to imply as matter of law a duty on the part of the Express Company to do otherwise" (fol. 420).

It is believed that the Circuit Court of Appeals missed the point of the libellant's contention. The libellant objects, not to the acceptance by the Express Company of the ordinary form of bill of lading, but to the failure of the Express Company to pass on to the Steamship Company information that the car was worth £800, which information the libellant had been careful to give to the Express Company. Had such information been given to the Steamship Company the libellant's right to recover full damages for the destruction of his car would have been preserved without any increase in the rate of transportation charged by the Steamship Company. A forwarding agent owes the duty of reasonable care in connection with the forwarding, and it is submitted that the failure to declare the value, an omission fraught with such serious consequences to the shipper, constitutes negligence.

The obligation of the Express Company to de-

clare the value of the car is quite analagous to the duty of every forwarding agent to pass on to the carrier the full instructions for delivery received by it from the shipper, and it is well settled that the forwarder is liable for failure to perform this duty.

Little Miami R. R. Co. v. Washburn, 22 O. St., 324;
Chartrand v. Southern Ry. Co., 85 So. Car., 479;
Forsythe v. Walker, 9 Pa. St., 148;
North v. Transportation Co., 146 Mass., 315;
Colfax Fruit Co. v. Railroad, 118 Cal., 648.

It is not perceived what further competent evidence on the subject the libellant could be expected to adduce.

It is also said in the opinion of the Circuit Court of Appeals (fol. 419) that, as the libel was framed on the theory that the Steamship Company was a common carrier, libellant cannot recover on the theory that it was a forwarding agent guilty of negligence. The rule as to admiralty pleading was laid down in *The Gazelle and Cargo*, 128 U. S., at page 487, as follows:

> "In the courts of admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance, or of departure in pleading, as at common law; and if a libellant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded),

> the Court may award any relief which the law applicable to the case warrants. *Dupont v. Vance*, 19 How., 162; *The Syracuse*, 12 Wall., 167; *Dexter v. Munroe*, 2 Sprague, 39; *The Cambridge*, 2 Lowell, 21. Decree affirmed."

The facts as to the shipment of the car were pleaded in the libel, the only defect asserted being a mistake as to the legal effect of the contract entered into between Mr. Reid and the Express Company. There was obviously no surprise as the substantial facts were all agreed upon in advance of trial (Libellant's Exhibit 1, fol. 317, *et seq.*), and the theory that the Express Company was a mere forwarding agent liable only for negligence was first propounded in the answer of the Express Company itself (Second Defense, fols. 20, *et seq.*) No objection to the pleadings was made by counsel for any party in the District Court or in the briefs or argument in the Circuit Court of Appeals. The point was first raised in the opinion of the Circuit Court of Appeals, when it was too late to amend the libel.

Conclusion.

It is respectfully submitted that this is a proper case for the issue of a writ of certiorari, for the following reasons:

1. The doctrine of *The Miramar,* constituting a reversal of the previous authorities, should be considered by this Court after full argument before it becomes settled law.

2. The present decision of the Circuit Court of Appeals as to the scope of its powers is in conflict with the decisions in the Fourth Circuit in *The Keystone State* and the Ninth Circuit in *The John and Winthrop.*

3. This case presents one of the issues presented in *George M. Pierce v. Wells Fargo,* in which a writ of certiorari was granted and which this Court has not yet decided.

4. The Circuit Court of Appeals erred in not finding the Express Company guilty of negligence as matter of law.

Dated, November 5, 1914.

Respectfully submitted,

HOWARD S. HARRINGTON,

OSCAR R. HOUSTON,

Of Counsel.

Sirs:

TAKE NOTICE that we shall submit the foregoing brief in support of a petition for a writ of certiorari to the Supreme Court of the United States at the opening of the Court on Monday, November 30 1914.

Dated, November 5th, 1914.

Yours, etc.,
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner.

To:—

Carter, Ledyard & Milburn, Esqs.,
Proctors for Respondent, Fargo.

Burlington, Montgomery & Beecher, Esqs.,
Proctors for Respondent,
International Mercantile Marine Company.

O'Brien, Boardman & Platt, Esqs.,
Proctors for Respondent,
T. Hogan & Sons, Inc.

3

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 279.

OGDEN M. REID,
(*Libellant-Appellee*) *Petitioner,*
against

JAMES C. FARGO, as President of the American Express Company,
(*Respondent-Appellee*) *Respondent;*

AND

INTERNATIONAL MERCANTILE MARINE COMPANY,
(*Respondent-Appellee*) *Respondent;*

AND

T. HOGAN & SONS, INCORPORATED,
(*Respondent-Appellant*) *Respondent.*

BRIEF FOR T. HOGAN & SONS.

O'BRIEN, BOARDMAN & PLATT,
Proctors for T. Hogan & Sons.

(24,433)

Stillman Appellate Printing Co., 51 Broad St., N. Y.

Supreme Court of the United States,

October Term, 1915.

No. 279.

OGDEN M. REID,
(Libellant-Appellee) Petitioner,

against

JAMES C. FARGO, as President of the American Express Company,
(Respondent-Appellee) Respondent,

and

INTERNATIONAL MERCANTILE MARINE COMPANY, Impleaded,
(Respondent-Appellee) Respondent,

and

T. HOGAN & SONS, INCORPORATED, Impleaded,
(Respondent-Appellant) Respondent.

BRIEF FOR T. HOGAN & SONS.

In his petition for a writ of certiorari, petitioner states at page 6:

"The Petitioner seeks no relief in this application as against T. Hogan & Sons, the Stevedores. They are lia-

ble only for negligence, and the Petitioner concedes that the decision of the Circuit Court of Appeals on this contested question of fact need not be reviewed by this Court."

In the brief for the American Express Company the question of negligence is discussed.

The Circuit Court of Appeals as to the question of negligence stated:

"T. Hogan & Sons had no contract with the libellant and are only liable for negligence. The mere breaking of the rope does not establish negligence, but it does require them to give an explanation which will discharge them of negligence because the case and the steam winches and the whole operation were in their exclusive control. They have shown that the rope was furnished to them by the Steamship Company, that it was new, free from any external defects, of a size sufficient for the load, was slung in the usual way and that the case was raised in the usual manner and without any jerk or sudden strain. We think it follows that the accident was not caused by their negligence, but must have been due to a latent defect. The rope belonged to the Steamship Company and went back into its possession after the accident. It has not been produced because it has been lost. We think that T. Hogan & Sons are not liable to the libellant" (p. 84).

Although we assume that this Court will not review the question of negligence, we shall, in view of the position taken by the proctor for the Express Company, refer briefly to the evidence as to negligence.

FIRST POINT.

The rope was furnished by the Steamship Company.

T. Hogan & Sons' foreman, Nelson, testified:

"The rope is given to T. Hogan & Sons by the Atlantic Transport Company, they furnish all the rope and gear which T. Hogan & Sons use. * * *

"Q. Did you have any slings of your own? A. Our slings are the Atlantic Transport's slings; I didn't get them.

"Q. Did you have any slings of Hogan's? A. No, sir.

"Q. How many years has it been customary for the steamship to furnish you with a sling? A. That was long before my time, and I have been there for about 14 years.

"Q. Describe this sling? A. Well, as near as I can describe it, it is what we call manila rope, and it is joined together, what we call a splice in it, that forms the sling, and the rope is furnished by the company, and of course it looked like good rope" (pp. 29-30).

And again:

"Q. You say the ship furnished all these slings? A. Yes, sir; that is to say, the Atlantic Transport furnished them; not the ship, but the company.

"Q. Where did you get your instructions to get your slings from the storekeeper? A. Well, it has been my practice since I have been there to send to the storeroom and get my slings; they furnish all the ship gear.

"Q. You are answering everything but what I asked you. Who instructed you to go to the ship's storekeeper

to get the slings? A. Well, there is no one instructed me, but it is a regular thing for us to do it.

"Q. It is a customary thing for you to do it? A. Sure, it is a customary rule for us to do it, yes, sir.

"Q. That has been the practice with this ship? A. Yes, sir.

"Q. And this company? A. Ever since I have been there, and prior to my employment there" (pp. 38-39).

Foreman Norton testified:

"Q. Did T. Hogan & Sons have any slings of their own? A. No, sir.

"Q. Where did they usually get slings? A. From the storekeeper.

"Q. Do they always get them from there? A. Yes, sir." (p. 44).

This corrects the conflicting statement made by mistake by Mr. Norton and quoted in the brief for the Express Company.

Superintendent Nelson (the father of Foreman Nelson) testified:

"Q. Will you tell me what was furnished in the way of equipment for unloading the vessel by T. Hogan & Sons? A. Well, all the gear was furnished by T. Hogan & Sons outside of the rope, lights and tents; they were furnished by the steamship company.

"Q. What is a tent? A. They are a kind of a tent which sets the same as an umbrella on the hatches when it is raining, to keep the water from going down to destroy the cargo; it is just the same as umbrellas over the hatches. We keep the hatches covered when it rains.

"Q. Did you have charge of purchasing the equipment for Hogans? A. Yes, sir.

"Q. And you are famiiar with what it was? A. Yes, sir."

"Q. Did you have at that time any ropes at all? A. No ropes whatever on the pier.

"Q. Did you employ a storekeeper? A. Yes, sir, one-half; we paid about half and the company pays about the other half; we pay them $15 a week, anyway; I don't really know what the company pays them, whether they pay him $3 or $6, I am not sure.

"Q. So far as your company is concerned, you pay $15 a week? A. Yes, sir.

"Q. Did you employ him? A. We employed him, of course, for our company.

"Q. You employed him for Hogan & Company? A. Yes.

"Q. Can you state what his duties were in connection with your tackle? A. His duty was to have the gear in order for us when the steamer came in, so we could go and get the steamer rigged up as soon as possible; so we would have to put our men on to go to work on the chains and block and tackle, et cetera.

"Q. Did you send him in for the rope, when you wanted it? A. I sent him in for all ropes; he has the entire charge of all the ropes and all the company's gear and all our gear.

"Q. Did you have any supervision over him at all, in reference to the ropes, or were you compelled to take whatever he handed you?

Mr. Taylor: Objected to.

The Court: Leave out the word 'compelled.'

"Q. Did you take whatever he gave you? A. We took whatever he gave us" (p. 40).

It is well settled that, where the ship furnishes the rope used by the stevedore, the responsibility for the condition of the rope rests with the ship and the stevedore is justified in assuming it is safe.

Foster vs. Bucknall (206 Fed. 415).
The Phoenix (34 Fed. 760).
The Rheola (19 Fed. 926).

SECOND POINT.

The fall of the automobile was caused by a defect in the rope furnished by the Steamship Company and not by any act or omission of T. Hogan & Sons or its employees.

The sole cause of the accident was the break in the rope. The testimony introduced on behalf of T. Hogan & Sons describes the unloading of the automobile step by step. In hoisting the automobile from the hold it was necessary to pass a rope or sling around the box and to hook this sling into the hook fastened into the end of the hoisting cable or "fall." The first step therefore was to get the sling. The sling is an endless rope made by splicing together two ends of a rope. The sling was furnished by the Steamship and belonged to the Steamship Company, as already pointed out. The foreman, Andrew Nelson, sent one of his men to the storekeeper to get the sling (pp. 29, 35). The sling which was procured and which was actually used in hoisting the automobile was of 3¾ inch rope (pp. 29, 30). It had been made by joining the ends of a rope about 60 feet long, so that the sling itself was an end-

less rope about 30 feet long (p. 30). The sling was made of the heaviest and largest rope ever used by the employees of T. Hogan & Sons in unloading vessels (pp. 30, 34). Foreman Nelson, who has been in the business for fourteen years (p. 29), testified that the sling was of the size which he had always used in lifting automobiles. He unloaded three or four automobiles each week and loaded from fifty to sixty, always using the same kind of a rope. He had never had a similar accident before (p. 30). He had handled many shipments of the same weight with the same kind of rope and had handled many shipments a a great deal heavier than this one with the same size sling. Witness Kenny, a stevedore, had seen the same size used in lifting automobiles, and had never before known the sling to part (p. 41). He testified that a sling of that size was capable of lifting a greater weight than that of Mr. Reid's automobile (p. 42). Foreman Nelson testified that he had handled machines of similar weight frequently, using the same size sling, and had never had any accident with the sling, although the same method of unloading was employed (pp. 43, 44). Superintendent Nelson, with thirty years' experience, testified that this was the largest size of rope used for a sling, and that he had lifted machinery and automobile repeatedly with similar slings (pp. 50, 51).

The weight of the automobile was 5,300 pounds. This weight was declared by the shipper (pp. 22, 23). It was marked on the box (p. 34), and was the weight furnished to the stevedores by the Steamship Company (pp. 35, 38, 39). The stevedore is obliged to depend upon the weights indicated by the Steamship Company or on the boxes (p. 38).

The lifting capacity of a single strand of the rope used is at least five tons, or more than double the weight of the automobile (pp. 34, 35, 36, 42).

Foreman Nelson took the the sling into the ship's hold to place it around the automobile box (p. 29). Before placing it around the box he passed the rope through his hands (p. 35). He had been handling ropes of that size for about fourteen or fifteen years and was trained to detect any visible defects in a rope (p. 31). He testified that the sling in question was made up of a good rope; "it wasn't exactly a brand new rope, but it was in good condition. * * * No cuts whatever, not a break in any part of it" (p. 31). There was nothing at all about the rope to indicate that there was anything wrong with it. No part of it looked different from the ropes that he had used during the fourteen years of his experience (p. 31). He said: "We handled the sling to pass it around this automobile, and it is necessary to handle the sling when you are passing it around the automobile, and you see it; and it seemed perfectly safe to use; there was no part of it which was parted or stranded, as we call it, on the sling" (p. 31). He testified: "Q. You have said that this rope had been used. Can you form any idea as to how old it was? A. That is something I can't tell; it wasn't very old, because the newness of the rope was there and there was a little dirt on it, like a little dirt from the pier, perhaps; of course, the rope was good, though, as good as a new rope" (p. 37).

After the accident the rope was taken possession of by the Steamship Company's superintendent, who testified at the trial that he removed the sling to his own office, and that thereafter it became lost (pp. 47, 48).

After passing the sling around the automobile case and hooking it to the hook at the end of the hoisting cable, the next step was to raise the automobile perpendicularly out of the hold. Foreman Nelson, after placing the sling around the automobile, saw that it was properly secured, and then got on top of the box and rode up from the lower hold to the deck (p. 31). As the case passed above the hatchway he stepped off on the deck (p. 37). When the case was clear of the deck another lifting cable or "fall" was hooked into the sling. This fall passed through a stationary block placed over the edge of the dock (p. 32). The case then became suspended between two stationary blocks, one above the hatch and the other above the edge of the dock. By lifting upon the rope passing through the block at the dock's side, and easing up upon the rope passing through the block above the hatch the case was conveyed over the deck to the ship's side (pp. 32, 37, 38). As the case was thus passing over the side of the ship, suspended in the air, the sling parted (not at the splice) and the automobile fell into the water (pp. 38, 33, 34, 36, 37, 43, 44, 45).

The sling was placed upon the box carefully and after the ordinary manner (pp. 31, 32). The entire operation of raising the case and passing it across the deck was performed carefully, smoothly and without any jars (pp. 46, 47). The sole cause of the fall was the parting of the sling. No other part of the equipment was broken (p. 33).

The foreman, John Norton, examined the sling after the accident. He testified:

"Q. What did you find? A. I found the sling was carried away, parted; there were three different lengths to the strands; they were all of different lengths.

"Q. Was the sling cut or frayed, or broken? A. No, just the usual part; the sling, when it is cut, is usually cut square; but when it parts, it parts different lengths; one strand will probably go before the other, and will stretch out the length of the next strand; it doesn't part square" (p. 43).

"Q. You examined the sling, however, when it broke? A. Yes, sir.

"Q. And you have said that that broke in three places, different strands breaking? A. Yes, not in different places; in three lengths; one a couple of inches longer than another.

"Q. Did you examine the strands where the break had taken place? A. I just looked at the ends.

"Q. Did you discover any defect there in explanation of the break? A. No, I did not.

"Q. Did you see any evidence of cutting? A. No" (p. 44).

The testimony of Mr. Evans, assistant superintendent for the Steamship Company, which testimony is emphasized in the brief for the Express Company, does not contradict the testimony of Mr. Norton. Mr. Evans testified that the strands were probably eight inches in length, that it was a shorter break than is usual when a rope parts; but he admits "that the rope might have

broken and, being pressed against the case, might not have ravelled" (p. 48). Mr. Evans had possession of the rope until it was lost, and if there had been any appearance of cutting he would have been in a position to so testify, but he did not in any way dispute the testimony of Mr. Norton to the effect that the strands were of unequal lengths, indicating a parting or break rather than a cutting.

The contention that the rope was broken by the square edges of the case is not a proper inference from the testimony. As to this the only evidence is:

Foreman Nelson testified on cross-examination as follows:

"Q. In putting this sling around the automobile case, did you put anything under the edges to keep the rope from the edges of the case? A. No, sir, it is all wooden battens all the way around; it don't necessitate putting anything around; there is no iron on it or anything like that, it is all wood.

"Q. But it is a square edge? A. Well, you can call it a square edge if you like, but there is nothing that is cut on them; it is all smooth.

"Q. As a matter of fact, you didn't put any blocks under those square edges? A. No, sir" (p. 36).

And on redirect-examination as follows:

"Q. Is it customary to place any padding or boards under the corners of a case of this size? A. No, sir.

"Q. Was this sling placed in that respect exactly as is customary? A. Yes, sir" (p. 38).

He had also testified on direct-examination:

"Q. Is that the way you have always been in the habit of fastening the slings around cases of that size? A. Yes, sir" (p. 32).

There is no suggestion in the evidence that any employee of T. Hogan & Sons was negligent. The cause of the accident is clearly indicated. The operation was performed with due care and the stevedores were entirely justified in assuming that the rope would hold. The parting of the rope was an event which they could not have foreseen and could not have avoided, and for which they are not responsible (The King Gruffydd, 131 Fed. 189). The Steamship Company contracted to furnish safe transportation. Its duty included the furnishing of a proper rope. It undertook to furnish a rope. After the rope broke the Steamship Company took it and lost it. It made no attempt to show due care.

The following cases do not support the contention that the stevedores are chargeable with negligence:

San Juan Light Co. vs. Requena, 224 U. S. 89;
Sweeney vs. Erving, 228 U. S. 233.

These cases involve the doctrine of *res ipsa loquitur*. They confirm the statement of the Circuit Court of Appeals that "the mere breaking of the rope does not establish negligence, but it does require them (the stevedores) to give an explanation which will discharge them of negligence."

The uncontradicted evidence is that the stevedores used due care. The stevedores were not insurers of the safety of the automobile. There was no presumption of

negligence. The burden remained upon the petitioner to prove negligence (*Sweeney vs. Erving*, 228 U. S. 233, at 240).

The case of *The King Gruffyd* (131 Fed. 189), decided by the Circuit Court of Appeals for the Second Circuit, involved the contention that, because a topping lift which broke was selected by the stevedores the risk was upon them. The evidence showed, as in the present case, that the stevedores had no knowledge of any defect in the topping lift, that it was in apparent good order, and that such a topping lift was known by experience to be capable of meeting the demands to be made upon it. The Court of Appeals held that the question was whether a reasonably prudent man would have rejected the wire topping lift in favor of a chain, and decided that, in view of the evidence, it could not be held that there was any negligence in the selection of the topping lift instead of the chain. The same question, involving the same accident, was decided by the Appellate Division of the New York Supreme Court in *Connors vs. King Line* (98 A. D. 261). That court came to the same conclusion, holding: "The contention that because the selection of the topping lift was made by the stevedores the risk was upon them, is, we think, untenable."

Respectfully submitted,

O'BRIEN, BOARDMAN & PLATT,
Proctors for T. Hogan & Sons, Incorporated.

LIVINGSTON PLATT,
of Counsel.

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No. 689 279

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

OGDEN M. REID,
(*Libellant-Appellee*) *Petitioner*,
against

JAMES C. FARGO, as President of the American Express Company,
(*Respondent-Appellee*) *Respondent*;

AND

INTERNATIONAL MERCANTILE MARINE COMPANY,
(*Respondent-Appellee*) *Respondent*;

AND

T. HOGAN & SONS, INCORPORATED,
(*Respondent-Appellant*) *Respondent*.

Brief on Behalf of James C. Fargo, as President of the American Express Company, in Opposition to Petition for Certiorari.

WALTER F. TAYLOR,
Advocate for James C. Fargo, as President of the American Express Company, Respondent-Appellee.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

In the Supreme Court of the United States,

OCTOBER TERM, 1914.

OGDEN M. REID, (Libellant-Appellee) Petitioner, AGAINST JAMES C. FARGO, as President of the American Express Company, (Respondent-Appellee) Respondent, AND INTERNATIONAL MERCANTILE MARINE COMPANY, (Respondent-Appellee) Respondent, AND T. HOGAN & SONS, (Respondent-Appellant) Respondent.	No. 689.

BRIEF ON BEHALF OF JAMES C. FARGO AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

The Circuit Court of Appeals in reversing the decree holding T. Hogan & Sons primarily

liable clearly had power to reverse it in so far as it held the Express Company secondary liable.

The opinion of the Circuit Court of Appeals in *Munson S. S. Line vs. Nuramar S. S. Co., 167 Fed. Rep., 960*, fully sustains the conclusion reached by the Court, to-wit, that an appeal in admiralty vacates altogether the decree of the District Court so that the case is tried *de novo* in the Circuit Court of Appeals. This Court refused to grant a writ of *Certiorari* in that case and the question presented should be deemed settled.

II.

The petitioner's claim against the Express Company is not meritorious.

The Express Company took charge of the shipment of the automobile upon the written request of the petitioner's agent, and only for the purposes and upon the conditions expressly stated (See Case on Appeal, folio 320, Exhibit II., page 111, Exhibit III., page 113). Among the conditions subject to which the Express Company took charge of the shipment were the following (italics ours):

> 1. "The shipment covered by this declaration is only accepted by the American Express Company, as a Forwarding Agent for the shipper, *subject to the conditions as to the limit of liability for loss or damage*, and all the rules, regulations and conditions (printed, written or stamped), appearing in the tariffs, Bills of Lading, or receipts, of the different Railways, Transportation Companies, Steamers, Carriers, and others through whose hands it may pass. All risk and responsibility of said American Express Company for loss, damage or delay, to said property will cease on delivery in transit to such Railway, Transportation

Company, Steamer, Carrier or others necessarily employed in the handling and transportation of the shipment from point of origin to destination. * * *

2. "*A copy of invoice and a declaration of contents and value must accompany every package.*" * * *

The Express Company delivered the automobile to the International Mercantile Marine Company for transportation to New York and received from the International Mercantile Marine Company its bill of lading covering the shipment (folio 322), The bill of lading was in the usual form used by the International Mercantile Marine Company and contained the clause which in the same or in similar form is almost universally used in steamship bills of lading, to-wit:

"It is mutually agreed that the value of each package hereunder does not exceed $100 or its equivalent in English currency on which basis the freight is adjusted and the Carrier's liability shall in no case exceed the sum, unless a value in excess thereof be specifically declared, and stated herein, and extra freight as may be agreed on paid (folio 383)."

In the instruments signed by the petitioner's agent, the petitioner elected not to have the automobile insured through the Express Company and he paid the Express Company nothing for insurance (folio 340, pages 111 and 114).

He seeks to hold the Express Company for the damage to the automobile solely on the ground that its value was stated to be £800; and the Express Company delivered it to the Steamship Company without declaring that value or any other value.

The statement of the value of the automobile in the shipping instructions did not import a direction to the Express Company to ship it at that valuation and to pay extra freight. For the conditions under which the Express Company took charge of the shipment require that the value of a shipment shall always be disclosed to it and at the same time make the limitation of value contained in a steamship bill of lading binding on the shipper. The right to accept a bill of lading limiting value notwithstanding

the disclosure of the true value of the Express Company is clearly conferred on it. The theory of the instruments is that any resulting risk may be covered by insurance. The petitioner's election not to insure destroys any possible implication of an instruction by him to the Express Company to ship the automobile at a declared value.

III.

Should the Court grant a writ of certiorari in this case, it would necessarily have to consider and pass upon the evidence bearing upon the question of negligence.

The District Court and Circuit Court of Appeals differed upon the question whether the evidence shows that T. Hogan & Company were guilty of negligence causing the damage to the automobile. If the case is reviewed here, the parties must necessarily ask the Court to go into the evidence and decide for itself the question of negligence.

It is submitted that the petition for a writ of *certiorari* should be denied.

Dated, New York, November 23rd, 1914.

Respectfully submitted,

WALTER F. TAYLOR,
Advocate.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 279

OGDEN M. REID
(Libellant-Appellee)
Petitioner

AGAINST

JAMES C. FARGO, as President of the American Express Company
(Respondent-Appellee)
Respondent

AND

INTERNATIONAL MERCANTILE MARINE COMPANY
(Respondent-Appellee)
Respondent

AND

T. HOGAN & SONS
(Respondent-Appellant)
Respondent

BRIEF IN BEHALF OF INTERNATIONAL MERCANTILE MARINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES C. BURLINGHAM
NORMAN B. BEECHER
COUNSEL FOR INTERNATIONAL MERCANTILE MARINE COMPANY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

OGDEN M. REID
(Libellant-Appellee)
Petitioner

AGAINST

JAMES C. FARGO, as President of the American Express Company
(Respondent-Appellee)
Respondent

AND

INTERNATIONAL MERCANTILE MARINE COMPANY
(Respondent-Appellee)
Respondent

AND

T. HOGAN & SONS
(Respondent-Appellant)
Respondent

} No. 689

BRIEF IN BEHALF OF INTERNATIONAL MERCANTILE MARINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The principal question presented is one of practice. In *The Steamship Miramar Company* v. *Munson Steam-*

ship Line, 214 U. S., 526, this Court refused to review the same point of practice, denying an application for a writ of *certiorari.* The suggestion at page 4 of the brief submitted for the petitioner that the denial of the petition in the *Miramar* case "may well have been because of the very small amount involved," does not accord with the principle upon which writs of *certiorari* are granted by this Court. The amount involved does not necessarily determine whether the question is one of gravity and general importance, *Fields* v. *United States,* 205 U. S., 292.

Notwithstanding that the decision of the Circuit Court of Appeals for the Second Circuit in this case, with respect to the point of practice involved, may differ from decisions in somewhat similar cases in other circuits, the conflict of decision does not directly affect the rights of the petitioner, as was the case in *Forsyth* v. *Hammond,* 166 U. S., 506. If it is the purpose of the 59th Rule to do complete justice between all the parties, including those who may be brought in by petition, this case would seem not to differ in principle from the *Miramar* case in any respect.

As to the merits of the case, the question of the validity of the clause in the bill of lading given by the International Mercantile Marine Company has been settled by many decisions, beginning with *Hart* v. *Pennsylvania Railroad Co.,* 112 U. S., 331.

In the brief submitted by the petitioner the contention is made that the International Mercantile Marine Company had in force no rate based on value, and that the automobile was received for carriage at a measurement rate; and that, therefore, the bill of lading clause

limiting liability to $100. did not properly apply. This contention is fallacious. It must be assumed that the measurement rate is based on the agreement, evidenced by the bill of lading, that the value of the goods shipped does not exceed $100. The freight rate need not be measured directly on the $100. value. It is just as truly, though indirectly, measured on the agreed value of $100., if that agreed value is the basis upon which the International Mercantile Marine Company agrees to charge its measurement rate. In *Cau* v. *Texas and Pacific Ry. Co.*, 194 U. S., 427, 431-2, Mr. Justice McKenna said:

"In other words, the consideration expressed in the bill of lading was sufficient to support its stipulations. *This effect is not averted by showing that the defendant had only one rate.* It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common law liability of the roads." (Italics ours.)

See also *Adams Express Co.* v. *Croninger*, 226 U. S., 491, 508-9.

The bill of lading contemplates that if an excess value is declared "*extra* freight as may be *agreed* on" shall be paid, not that the regular freight rate shall be altered.

It is undisputed that no value on the shipment was declared to the International Mercantile Marine Company. The American Express Company, which alone it knew in the transaction, accepted its bill of lading without question, as undoubtedly the Express Company had the right to do under the terms of its receipt providing that the shipment was accepted by it subject to the conditions as to the limit of liability for loss or damage

contained in the bills of lading of other carriers to whom the shipment might be turned over.

It is respectfully submitted that the petition for a writ of *certiorari* should be denied.

Dated, November 28, 1914.

CHARLES C. BURLINGHAM,
NORMAN B. BEECHER,
Counsel for the International Mercantile Marine Company.

[9745P]

BRIEF FOR PETITIONER.

Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 379.

OGDEN M. REID, PETITIONER,

vs.

JAMES C. PARGO, AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petition for Certiorari filed November 10, 1914.
Certiorari and Return filed December 24, 1914.

(24,433)

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Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 279.

OGDEN M. REID,
(Libellant-Appellee) Petitioner,

AGAINST

JAMES C. FARGO, as President of the AMERICAN EXPRESS COMPANY,
(Respondent-Appellee) Respondent,

AND

INTERNATIONAL MERCANTILE MARINE COMPANY, Impleaded,
(Respondent-Appellee) Respondent,

AND

T. HOGAN & SONS, INCORPORATED, Impleaded,
(Respondent-Appellant) Respondent.

BRIEF FOR THE PETITIONER.

Facts.

On December 21, 1910, Ogden M. Reid, the petitioner, delivered his Peerless motor car to the American Express Company (Respondent, hereafter called the Express Company) in London to be forwarded to New York. In his instructions for the shipment he stated the value of the car to be £800

or about $3,900 (p. 70*), and paid the Express Company's charges amounting to $150.00 (p. 3). The Express Company boxed the car and shipped it on the steamer *Minnewaska*, owned and operated by the International Mercantile Marine Company (Respondent, hereafter called the Steamship Company) (p. 69). The Express Company, without the knowledge or authority of Mr. Reid, accepted a bill of lading from the Steamship Company, providing, among other things, as follows:

> "It is also mutually agreed that the value of each package shipped hereunder does not exceed $100, or its equivalent in English currency, on which basis the freight is adjusted, and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid." (p. 79 *et seq.*).

The Express Company failed to declare to the Steamship Company any value for the car (p. 69).

The Express Company paid to the Steamship Company £22.12.0 or $109.61 freight (p. 69). This freight was *not*, in fact, based on the value of the car, either the $100. valuation or the true value, but was based exclusively on the number of cubic feet of space occupied (pp. 54, 55, 81, 82). If the Express Company had declared the value of the car at £800, freight would have been the same, as the Steamship Company had in force no rate based on value which could possibly have exceeded the rate actually paid (pp. 82, 56). The ship arrived safely at her dock in New York, and T. Hogan & Sons, Incorporated (Respondent, hereafter called the Stevedores), were engaged as stevedores in unloading the cargo. While the car was being unloaded by the stevedores, the sling in which it was carried broke, and the car fell into the water between the vessel and the dock and was badly damaged (p. 69).

* References are to the printed pages.

The Proceedings in the District Court.

Mr. Reid filed a libel *in personam* in the District Court for the Southern District of New York against the Express Company alone (p. 1). The Express Company by a petition under the 59th Rule brought in the Steamship Company (International Mercantile Marine Company) (p. 6) and the stevedores (T. Hogan & Sons, Incorporated) (p. 11). All three respondents answered. The case was heard on the merits before Judge Veeder. Judge Veeder entered a decree in favor of Mr. Reid for the full value of the car as fixed by the Special Master ($2,724.40) against the stevedores, in the first instance, with a provision that in the event and to the extent that the libellant was unable upon execution to collect the amount of judgment against the stevedores he should recover it from the Express Company (p. 65). The petition bringing in the Steamship Company was dismissed without costs (p. 64).

Judge Veeder wrote no opinion. It is clear, however, from the pleadings and from his remarks in the course of the trial that the findings upon which this decree was founded are the following:

1. That the Express Company was liable to Mr. Reid on its contract, either on the theory that it was negligent in failing to declare the true value of the car to the Steamship Company, or upon its liability as a common carrier.

2. That the Express Company had no recourse over against the Steamship Company, because the valuation clause of the bill of lading was valid. (Strictly speaking, of course, on this theory the decree should have held the Steamship Company contingently liable to the extent

of $100., but as all the respondents are amply responsible, such recovery is immaterial and was apparently overlooked by the learned District Judge.)

3. That the Express Company was entitled to recover over against the stevedores because they were negligent in handling the car (pp. 28, 51), and were thus ultimately liable.

The decree, in order to avoid circuity of recovery, awarded to Mr. Reid recovery in the first instance against the stevedores with a right over against the Express Company (pp. 65, 66).

Proceedings in the Circuit Court of Appeals.

The stevedores alone among the respondents appealed to the Circuit Court of Appeals for the Second Circuit (p. 66). None of the other parties appealed from any part of the decree or filed assignments of error. The stevedores' assignments of error (p. 67) attacked the decree so far as it held the stevedores liable, and also attacked the failure of the Court to find that the Steamship Company had failed in its duty to supply a safe rope. In no assignment of error was the Express Company referred to.

In the argument in the Circuit Court of Appeals the only question discussed was whether or not the stevedores were guilty of negligence, and no substantial question was raised, but that, whatever disposition the Court might make of the appeal as to the liability of the stevedores, the recovery against the Express Company would not be affected (Petition for a Rehearing, pp. 88–96).

The Circuit Court of Appeals reversed the entire judgment as to every party. The opinion written

by Judge Ward proceeds upon the following theory in substance (p. 84) (reported 213 Fed., 771):

1. That the stevedores were not shown to be guilty of negligence and were, therefore, not liable to anyone.

2. That the Steamship Company was not liable in excess of $100., because the limitation of value in its bill of lading was valid.

3. That the Express Company was a mere forwarder and that its failure to declare to the Steamship Company the true value of the car, although such value had been declared by Mr. Reid to the Express Company, was not negligence on its part (p. 85).

POINT I.

As the Express Company did not appeal from so much of the decree of the District Court as held it liable to Mr. Reid, it could not be heard in the Circuit Court of Appeals to contest its liability, and the Circuit Court of Appeals had no power to reverse this portion of the decree.

The only appeal taken from the decree of the District Court was by the stevedores, and the only questions raised by their assignments of error were as to their liability for negligence and their rights against the Steamship Company for its negligence in failing to provide a proper rope (pp. 66, 67). The Circuit Court of Appeals reversed the decree as to the other parties upon the following theory (p. 84):

> "It is the law of this circuit that an appeal in admiralty vacates the decree below, and the cause is tried anew in this court. Other parties without appealing may have new relief. *Munson Line* v. *Miramar Steamship Co.*, 167 F. R., 960."

The Miramar, also decided by the Circuit Court of Appeals for the Second Circuit, was a libel for breach of a time charter party. The District Court entered a decree for the libellant for less than the amount claimed (150 Fed. Rep., 437). On appeal by the respondent only, the Circuit Court of Appeals first affirmed the decree, saying, however, that the libellant was entitled to more than the District Court had awarded, but adding

> " as, however, the libellant has not appealed, it " must be content with the amount awarded " (166 Fed., 722, at p. 724).

A motion to modify this decision was then made, and the Circuit Court of Appeals modified its decree by awarding to the libellant the amount to which he was entitled (167 Fed., 960).

In the latter opinion, the Circuit Court of Appeals says that there appeared to be two lines of inconsistent decisions as to the power of the Appellate Court in Admiralty. One line of cases holds that an appeal in Admiralty is a trial *de novo*, and the Appellate Court has the same powers that the trial Court originally had. The leading case relied on is *Irvine* v. *The Hesper*, 122 U. S., 256. In that case the District Court awarded $8,000. salvage to the libellants, who appealed to the Circuit Court. The claimant did not appeal, but the Circuit Court reduced the award to $4,200. The libellants then appealed to the Supreme Court, which affirmed the decree of the Circuit Court, saying (Mr. Justice Blatchford writing):

"The claimants not having appealed to the Circuit Court, it is suggested that they are liable for at least the amount awarded by the District Court, and that the Circuit Court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. *Yeaton* v. *United States*, 5 Cranch, 281; *Anonymous*, 1 Gallison, 22; *The Roarer*, 1 Blatchford, 1; *The Saratoga* v. *438 Bales of Cotton*, 1 Woods, 75; *The Lucille*, 19 Wall, 73; *The Charles Morgan*, 115 U. S. 69, 75. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

The other line of cases is to the effect that even in Admiralty a party who has not appealed from a decree can be heard only in support of the decree and cannot obtain affirmative relief.

The two principles announced in these two lines of cases, it is submitted, are not necessarily inconsistent. It would seem that an appellate court might properly try the case *de novo* on the law and the facts and still decline to award affirmative relief to a party who had not, by appealing, asked for relief.

It must be admitted that the applications of the two rules in the Circuit Court and the Circuit Court of Appeals in some cases has been inconsistent, as pointed out in *The Miramar*. In the cases before this Court, however, it is believed that there is no conflict between the actual decisions, except in the case of *Irvine* v. *The Hesper*.

The cases in the Supreme Court on which *The Miramar* is based are the following:

The John Pinkney, 5 Cranch., 281:

In this case the schooner had been condemned for breach of the Act of Congress prohibiting intercourse with certain ports of the Island of St. Domingo. After the condemnation and before the hearing in the Supreme Court, the Act of Congress was repealed, and this Court held that the appeal suspended the sentence altogether and the vessel could not be condemned after the repeal of the act.

The Hope, 10 Pet., 108:

This was a salvage case in which the District Court awarded $15,000 salvage. The owners appealed. The passage from this case, cited in *The Miramar*, is from page 119, and is as follows:

> "No objection has been made to the amount of salvage decreed by the Court below if the libellants are entitled to any. And the objection has been properly abandoned; but the amount, under the circumstances, is certainly not unreasonable. Besides this Court is not in the habit of reversing such decrees as to the amount of salvage, unless upon some clear and palpable mistake or gross overallowance of the Court below."

It is submitted that this passage clearly refers to a *reduction* in the amount of the award, which, of course, would have been proper in any event on the appeal of the owners.

Post v. *Jones*, 19 How., 150:

This was a salvage case arising as follows:

A whaling ship was wrecked in the Arctic and the Captain sold the cargo to the claimants, who

brought it back to the home port. A libel was then filed by the original owners of the cargo on the theory that the sale by the Captain was under duress and void and praying for the fixing of salvage charges. The claimants answered. The District Court dismissed the libel, thereby affirming the sale by the Captain. The libellants appealed, and the Circuit Court reversed, declaring the sale invalid, but awarding the claimants half the value of the cargo by way of salvage. The claimants appealed to the Supreme Court and the Supreme Court decided that the sale was void, but that the claimants were entitled to one half the value of the cargo by way of salvage, and also freight from the first port of safety reached to the final destination where the oil was sold.

It is thus clear that both in the Circuit Court and in the Supreme Court it was the *appellant* who succeeded, and in neither Court was a party who had not appealed given greater relief than in the Court below.

The Camanche, 8 Wall., 448:

This, also, was a salvage case. The District Court awarded $24,000. salvage, and the claimants appealed. The Circuit Court affirmed the decree and so did this Court. The passage quoted in *The Miramar* is at page 479 and is as follows:

> "Appellate Courts are reluctant to disturb an award for salvage on the ground that the subordinate Court gave too large a sum to the salvors, unless they are clearly satisfied that the Court below made an exorbitant estimate of their services."

As the claimants were the appellants both in the Circuit and Supreme Courts, it would have been quite proper for either of those Courts to have reduced the allowance, and there is nothing in the

passage quoted to indicate that the Court even considered *increasing* the award in favor of salvors who had not appealed.

The Lucille, 19 Wall., 73:

This was a libel for collision. The District Court awarded $2,000. damages and on appeal the Circuit Court, by order, merely affirmed. This Court dismissed for want of jurisdiction, on the ground that there was no proper final decree from which an appeal could be taken.

The Connemara, 108 U. S., 352:

This was also a salvage case. The District Court awarded a salvage of eight per cent. of the value of the ship. The claimants appealed and the Circuit Court reduced the allowance to six per cent. The claimants further appealed to this Court, which affirmed the decree below. There is no intimation in the case that this Court considered it had power to increase the allowance in favor of the salvors who had not appealed.

The Charles Morgan, 115 U. S., 69:

This was a case of collision. The District Court found for the libellant in part, but rejected part of his claim on the ground that it was not sued for in the libel. *Both* parties appealed to the Circuit Court and the Circuit Court permitted the libellant to file a supplemental and amended libel including the disallowed claim, and rendered a decree for the libellant for the full amount of the loss. This Court affirmed the decree.

The only other case in this Court relied upon is *Irvine* v. *The Hesper*, referred to above, which, it must be admitted, lends support to the decision in *The Miramar*.

The cases in this Court to the effect that one who has not appealed cannot be heard except in support of the decree below, are the following:

Canter v. *American Insurance Co.*, 3 Pet., 307;
Stratton v. *Jarvis*, 8 Pet., 4, at pages 9, 10;
The William Bagaley, 5 Wall., 377, at page 412;
The Quickstep, 9 Wall., 665, at page 672;
The Maria Martin, 12 Wall., 31, at page 40;
The Mabey, 13 Wall., 738, at page 741;
The Merrimac, 14 Wall., 199, at page 201;
The D. R. Martin, 91 U. S., 365, at page 366;
The Stephen Morgan, 94 U. S., 599.

The decisions in the Circuit Court and Circuit Court of Appeals most of which are referred to in *The Miramar*, are numerous, and it must be admitted, conflicting.

It is believed that the decision in *Irvine* v. *The Hesper* being a departure from the previous rule in this Court should be either overruled or limited to salvage cases.

POINT II.

The present case is distinguishable from the Miramar.

Even if the rule of *The Miramar* is sound, the present case is distinguishable.

The present case involves, in substance, three distinct controversies consolidated for trial under the 59th Admiralty Rule. The libellant's right

against each of the respondents was complete in itself and quite independent of his rights against either of the other respondents. Thus, Mr. Reid's right against the Express Company depended upon whether or not it had been guilty of negligence in performing its written contract with him, whereby it undertook to transport or forward the car. Mr. Reid's rights against the Steamship Company depended upon the validity of the released valuation clause in the bill of lading, which it issued to the Express Company, and Mr. Reid's rights against the stevedores depended upon whether or not they had been guilty of negligence in handling the car. Mr. Reid could have sued any one of the three, either in Admiralty or at law, and such a suit could have been determined without bringing in any other parties. Mr. Reid, in fact, chose to enforce his remedy against the Express Company. Had he sued at law, or had the suit been brought before the right to petition in third parties in Admiralty was recognized, it is quite clear that the Express Company could not have brought in either of the other respondents.

A petition bringing in the other respondents is analogous to a cross-libel, except that a cross-libel is limited to a claim between the same parties relating to the same transaction.

In a case in which there was a libel and a cross-libel, this Court has said that the two proceedings are to be regarded as separate actions consolidated for convenience, and an appeal from the decree in one of the action does not open the decree in the other action.

The Dove, 91 U. S., 381, at pp. 384-5.

In this case a libel was filed for a collision, and the respondent besides answering filed a cross-libel on the theory that the original libellant was solely at fault. The District Court entered judgment for

the libellant on the original libel and dismissed the cross-libel. The losing party appealed from the decree on the libel, but did not appeal from the decree dismissing the cross-libel. The effect of this was stated by this Court (Mr. Justice Clifford writing) as follows (pp. 384–5):

> "Filed, as the cross-libel was, to enable the libellant in that suit to recover affirmative damages for the injuries received in the collision by his own vessel, which he could not recover under his answer in the original suit, the effect of the adverse decree, not appealed from, must be to preclude him from all such recovery in any subsequent judicial proceeding; but it was never heard that such a decree in a cross libel impaired the right of the libellant, as the respondent in the original suit, to make good, if he can, every legal defence of law or fact set up and well pleaded in his answer to the original libel. Usually such suits are heard together, and are disposed of by one decree or by separate decrees entered at the same time; but a decision in the cross-suit adverse to the libellant, even if the decree is entered before the original suit is heard, will not impair the right of the respondent in the original suit to avail himself of every legal and just defence to the charge there made which is regularly set up in the answer, for the plain reason that the adverse decree in the cross-suit does not dispose of the answer in the original suit.
>
> "Such a decree, if not appealed from, is conclusive that the libellant in the cross-suit is not entitled to recover affirmative damages for any injuries received by his own vessel; but it does not preclude him from showing in the original suit, if he can, that the collision was the result of inevitable accident, or that it was occasioned by the negligence of those in charge of the other vessel, or that it is a case of mutual fault, where the damages should be divided."

This case was referred to with approval in *Bowker* v. *United States*, 186 U. S., 135, at page 140, where

the function of a cross-libel was discussed, and it was *held* that a decree dismissing a cross-libel was not appealable until final decree on the libel, as both libel and cross-libel should be disposed of by one final decree.

The analogy between a cross-libel and a petition to bring in new parties was pointed out by Judge Brown in *The Hudson*, 15 Fed., 162, at page 172.

This is the case which first permitted the practice of bringing in additional parties and was the cause for the promulgation of the 59th Rule.

In re New York, etc., S. S. Co., 155 U. S., 523; *Benedict's Admiralty*, Sec. 410.

It seems clear that the separate issues raised by the bringing in of new parties under the 59th Rule are at least as much to be regarded as separable as the issues raised by a libel and cross-libel.

It is submitted, therefore, that the present proceeding is, in substance, three separate controversies between separate parties, and even though one decree disposes of the entire controversy, the substance of the matter should not be disregarded, but on appeal by one party, the review should be limited to the controversey between the appellant and the other parties.

The present case is analogous to the following decisions in the Fourth and Ninth Circuits:

Henderson vs. *Kanawha Dock Co., The Keystone State*, 185 Fed., 781; 107 C. C. A., 651. This was a proceeding in Admiralty begun by the filing of a libel for repairs to the *Keystone State*. The ship was sold by the Marshal and thereafter claims were filed by the mortgagee and also by the master for wages. The District Court gave the libellant priority in the distribution of the fund and the mortgagee appealed from its decree, but the Captain filed no appeal. The Circuit Court of Appeals for the Fourth

Circuit, after disposing of the appeal of the mortgagee on the merits, continued:—

"One other matter remains to be disposed of. J. B. Demere filed a claim below for $1,350 for wages as master. The special commissioner disallowed this claim on the ground that the master has no lien *in rem* for his wages. Demere did not except to the report. He did not appeal from the decree confirming it. He now files a brief asking that this court decree that under the law of Pennsylvania he has a maritime lien on the fund for three months' wages at $150. a month. He says that the fact that he did not except to the special commissioner's report or appeal from the order of the court below is immaterial. He argues that the appeal of the mortgagee brings the whole case up to be here heard and decided *de novo*. He relies upon *Irvine* v. *The Hesper*, 122 U. S., 256, 7 Sup. Ct., 1177, 30 L. ed., 1175; *The San Rafael*, 141 Fed., 270, 72 C. C. A., 388; *Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed., 969, 93 C. C. A., 360.

"Those authorities have no reference to such a case as his. It is in effect ruled by *The Dove*, 91 U. S., 384; 23 L. Ed., 354. There the Supreme Court held that an appeal from a decree passed upon a libel did not bring up for review a decree dismissing a cross-libel, when the latter decree had not been appealed from. Mr. Justice Clifford pointed out that the appeal brought up all the issues raised by the libel, so that they could be tried anew. The libellant might be awarded more or less than he had been given below, or his libel might be dismissed altogether. Affirmative relief, however, could not be given the respondent, because there was no case asking for it before the court. The libel and the cross-libel were separate proceedings. They are usually consolidated for the purposes of convenience, but they are logically distinct. In this case the claim of the master raised a distinctly separate issue, having nothing whatever to do with the controversy between the appellant and the appellee. It is the dispute between them which the appellant's appeal may

require us to try *de novo*. It brings up no other controversies. *The John and Winthrop* (C. C. A.), 182 Fed., 380."

The John and Winthrop, 182 Fed., 380; 106 C. C. A., 1, was a joint libel by the crew for wages and for breach of their contract of employment. The District Court entered a decree awarding the crew wages but denying them damages for breach of contract. The owners of the ship appealed but the seamen did not. The Circuit Court of Appeals for the Ninth Circuit said (at p. 387):

> "Had the appellees desired the review of the decree with respect to the causes of action alleging breach of contracts prior to August 3, 1908, they should have prosecuted an appeal from the decree upon that ground, and under the rule they would have been required to bring up all the testimony and other proofs adduced in the cause relating to such causes of action. In the absence of such a record we cannot review the decree with respect to the causes of action charging breach of contracts prior to August 3, 1908.
>
> "The case comes under the rule declared in *Oliver* v. *Alexander*, 6 Pet., 143; 8 L. Ed., 349, where the Supreme Court said (at p. 387):
>
> > "'The whole proceeding, therefore, from the beginning to the end of the suit, though it assumes the form of a joint suit, is, in reality, a mere joinder of distinct causes of action, by distinct parties, growing out of the same contract. * * * The claim of each seaman is distinct and several; and the decree upon each claim is, in like manner, distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another; for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners or other respondents is the sum or value of his

own claim, without any reference to the claims of others.'

"In *The Columbia*, 73 Fed., 226, 235; 19 C. C. A., 436, 445, this court applied this rule in a proceeding for the limitation of liability of an owner of a vessel under this statute with this remark:

"'The proceedings here in question are quite analogous to joint suits for seamen's wages and to the practice in cases of salvage.'

"The rule referred to in the case of *The San Rafael*, 141 Fed., 270; 72 C. C. A., 388, 'that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court and that the case is tried *de novo* in the Circuit Court', is, therefore, not applicable to this case."

POINT III.

The Merits of the Case.

Even if the entire case is to be decided *de novo* in the Appellate Court, it is submitted that the conclusion reached by the District Court as to the controversy between Mr. Reid and the Express Company, is correct, rather than that reached by the Circuit Court of Appeals.

The Circuit Court of Appeals decided, *first*, that the released valuation clause in the bill of lading was valid, and, *second*, that the Express Company was not negligent in failing to declare the true value of the car and thereby avoiding the operation of the released valuation clause. It is submitted that these two results are mutually inconsistent, and that one or the other must fall.

1. It was shown affirmatively that the rate charged by the Steamship Company for transportation of the automobile was, in fact, not based at all on the value of the car, but was based ex-

clusively on the number of cubic feet of space occupied (pp. 54, 78, 18), and that if the Express Company had declared the value of the car at £800, the freight rate would have been the same, as the Steamship Company had in force no rate based on value which could possibly have exceeded the rate actually paid (p. 57).

2. If the released valuation clause in the present case be valid, then it is submitted it necessarily follows that the Express Company was negligent in failing to declare the true value of the car to the Steamship Company. The Circuit Court of Appeals said of this contention:

> "Shippers almost invariably accept the carrier's ordinary bill of lading and in the absence of any evidence we are not disposed to imply as matter of law a duty on the part of the Express Company to do otherwise" (p. 85).

It is believed that the Circuit Court of Appeals missed the point of the libellant's contention. The libellant objects, not to the acceptance by the Express Company of the ordinary form of bill of lading, but to the failure of the Express Company to pass on to the Steamship Company information that the car was worth £800, which information the libellant had been careful to give to the Express Company. Had such information been given to the Steamship Company the libellant's right to recover full damages for the destruction of his car would have been preserved without any increase in the rate of transportation charged by the Steamship Company. A forwarding agent owes the duty of reasonable care in connection with the forwarding, and it is submitted that the failure to declare the value, an omission fraught with such serious consequences to the shipper, constitutes negligence.

The obligation of the Express Company to declare the value of the car is quite analogous to the duty of every forwarding agent to pass on to the carrier the full instructions for delivery received by it from the shipper, and it is well settled that the forwarder is liable for failure to perform this duty.

Little Miami R. R. Co. v. *Washburn*, 22 O. St., 324;
Chartrand v. *Southern Ry. Co.*, 85 So. Car., 479;
Forsythe v. *Walker*, 9 Pa. St., 148;
North v. *Transportation Co.*, 146 Mass., 315;
Colfax Fruit Co. v. *Railroad*, 118 Cal., 648.

The obligation of the Express Company is also analogous to the duty of the seller of personal property under a contract by which title is to pass to the buyer upon shipment by a common carrier. The duty of such a seller to ship in the usual and customary manner with reasonable care is believed to be substantially the same as that of the forwarding agent in the present case. It has been held to be negligence on the part of the seller to ship goods at a valuation substantially lower than the true value.

Clarke v. *Hutchins*, 14 East., 475 (1811):

In this case the defendant ordered goods from the plaintiff of the value of £51. The plaintiff shipped the goods by a vessel whose owner had published notice that he would not be answerable for any package above £5, unless the value were declared and extra compensation paid. Under the English rule, this was sufficient to limit the liability of the ship to £5, as plaintiff declared no value. In a suit

by the plaintiff for the purchase price, *Lord Ellenborough*, C. J., said:

> "The plaintiff cannot be said to have deposited the goods in the usual and ordinary way, for the purpose of forwarding them to the defendant, unless he took the usual and ordinary precaution, which the notoriety of the carriers' general undertaking required, with respect to goods of this value, to insure them a safe conveyance; that is, by making a special entry of them. He had an implied authority, and it was his duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance, as that in case of a loss the defendant might have his indemnity against the carriers."

Miller v. *Harvey*, 83 N. Y. Misc., 59:

In this case one of the inferior Appellate Courts in New York said:

> "I am of the opinion that when the plaintiff shipped the goods under a contract whereby the defendant could only recover half of their value, if lost or destroyed in course of transit, he failed to make a 'reasonable contract with the carrier on behalf of the buyer', and the defendant was, accordingly, within his rights in declining to treat the shipment of the goods under such a contract as a delivery to him."

It is also said in the opinion of the Circuit Court of Appeals (p. 85) that, as the libel was framed on the theory that the Steamship Company was a common carrier, libellant cannot recover on the theory that it was a forwarding agent guilty of negligence. The rule as to admiralty pleading was laid down in *The Gazelle and Cargo*, 128 U. S. 474, at page 487, as follows:

> "In the courts of admiralty of the United States, although the proofs of each party must

substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance, or of departure in pleading, as at common law; and if a libellant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief, (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded,) the Court may award any relief which the law applicable to the case warrants. *Dupont* v. *Vance*, 19 How., 162; *The Syracuse*, 12 Wall., 167; *Dexter* v. *Munroe*, 2 Sprague, 39; *The Cambridge*, 2 Lowell, 21. Decree affirmed."

The facts as to the shipment of the car were pleaded in the libel, the only defect asserted being a mistake as to the legal effect of the contract entered into between Mr. Reid and the Express Company. There was obviously no surprise as the substanial facts were all agreed upon in advance of trial (Libellant's Exhibit 1, p. 68, *et seq.*), and the theory that the Express Company was a mere forwarding agent liable only for negligence was first propounded in the answer of the Express Company itself (Second Defense, p. 4, *et. seq.*). No objection to the pleadings was made by counsel for any party in the District Court or in the briefs or argument in the Circuit Court of Appeals. The point was first raised in the opinion of the Circuit Court of Appeals, when it was too late to amend the libel.

The Minnie, 225 Fed., 36, at p. 38.

February, 1916.

Respectfully submitted,

HARRINGTON, BIGHAM & ENGLAR,
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OSCAR R. HOUSTON,
Of Counsel.

Supreme Court of the United States.

OGDEN M. REID,
(*Libellant-Appellee*),
Petitioner,

against

JAMES C. FARGO, as President of the American Express Company,
(*Respondent-Appellee*),
Respondent,

and

INTERNATIONAL MERCANTILE MARINE COMPANY, Impleaded,
(*Respondent-Appellee*),
Respondent,

and

T. HOGAN & SONS, INCORPORATED, Impleaded,
(*Respondent-Appellant*),
Respondent.

BRIEF FOR JAMES C. FARGO, AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY.

WALTER F. TAYLOR,
Advocate.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

SUPREME COURT OF THE UNITED STATES.

OGDEN M. REID,
(Libellant-Appellee),
Petitioner,

AGAINST

JAMES C. FARGO, as President of the American Express Company,
(Respondent-Appellee),
Respondent,

AND

INTERNATIONAL MERCANTILE MARINE COMPANY, Impleaded,
(Respondent-Appellee),
Respondent,

AND

T. HOGAN & SONS, INCORPORATED,
Impleaded,
(Respondent-Appellant),
Respondent.

BRIEF FOR JAMES C. FARGO AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY.

Statement.

This suit was brought to recover for damage to an automobile belonging to the libellant. The automobile was delivered to the American Express Company in London,

England, on the 21st day of December, 1910, and was by the Express Company delivered to the International Mercantile Marine Company at Southampton to be forwarded to New York by the steamship "Minnewaska" (pp. 68, 69). T. Hogan & Sons, Inc., were employed by the International Mercantile Marine Company to discharge the "Minnewaska." The automobile, while being removed from the steamship by T. Hogan & Sons, fell into the water. In the libel (p. 3) James C. Fargo, as President of the American Express Company, was named as respondent. The respondent, by petition (p. 6), brought in the International Mercantile Marine Company and thereafter, by further petition (p. 11), brought in T. Hogan & Sons, Inc. The interlocutory decree (p. 64) of the District Court adjudged that the libellant was entitled to recover the amount of the damages by him sustained from T. Hogan & Sons, Inc., and Fargo, and should have a decree against T. Hogan & Sons in the first instance and against Fargo in the event and to the extent that he was unable to collect upon execution the amount of his judgment against T. Hogan & Sons, Inc. The final decree (p. 65) fixed the amount of damages at $2,724.40 with interest and costs, making in all the sum of $3,377.75. An appeal (p. 66) to the Circuit Court of Appeals for the Second Circuit was taken by T. Hogan & Sons, Inc. The Circuit Court of Appeals reversed the entire decree and directed that a new decree be entered dismissing the libel and petition as against T. Hogan & Sons, Inc., dismissing the libel as against the American Express Company and adjudging the International Mercantile Marine Company (which operated the Steamship "Minnewaska") liable to the libellant, but only for one hundred dollars, the amount stated in the bill of lading of the "Minnewaska" to be the limit of recovery in respect to any one package unless a higher value were stated and entered in the bill of lading (p. 87).

The libellant applied to this Court for a writ of *certiorari* which was granted.

The Facts as to T. Hogan & Sons, Inc.

The District Court and the Circuit Court of Appeals have reached opposite conclusions as to the liability of T. Hogan & Sons. If the District Court was right in this regard all other questions in the case are academic.

The answers of T. Hogan & Sons, Inc., to the petition of James C. Fargo (p. 14) and to the libel (p. 15) admit that T. Hogan & Sons were employed to unload the steamship "Minnewaska" and that the automobile while being unloaded fell into the river; and allege affirmatively that the operation of unloading was conducted with all reasonable care and that the sling in which the automobile was suspended broke and that this sling was not their property but was furnished by the International Mercantile Marine Company. The evidence shows that the entire operation of unloading, including the adjustment of the slings (p. 29) the attachment of the falls and hooks (pp. 37, 46, 47) and the operation of the winches was in charge of the employees of T. Hogan & Sons (pp. 38, 46, 47). John Norton the foreman of T. Hogan & Sons, Inc., in charge of the ship, said that the chains, slings and blocks belonged to T. Hogan & Sons (pp. 42, 45). Another witness, Andrew Nelson said that the slings were furnished by the Atlantic Transport Company (pp. 29, 30). Whatever may be the fact as to the ownership of the slings it appears that all the gear used at that pier, whether it belonged to the ship or T. Hogan & Sons, was in charge of a storekeeper whose wages were paid partly by the Steamship Company and partly by T. Hogan & Sons, Inc. (p. 49). Nelson said, in reference to this storekeeper, that "his duty was to have the gear in order for us when the steamer came in, so we could go and get the steamer rigged up as soon as possible; so we would have to put our men on to go to work on the chains, blocks and tackle, et cetera." John Norton said (p. 45) in reference to the duties of the storekeeper: "He spliced all our slings and gave us all

our gear and our chains and blocks." There is no evidence that the breaking of the sling was due to a defect other than the fact that the rope broke.

Nelson states (p. 31) that he inspected the sling when he passed it around the automobile and it seemed perfectly safe; that there was no part of it which was parted or stranded; and that there was nothing to indicate that there was anything wrong with it (p. 31). He says: "It was a good rope; it wasn't exactly brand new but it was in good condition * * * No cuts whatever, not a break in any part of it." He examined the rope after the break and apparently found no evidence of a defect (pp. 33, 34). John Norton examined the sling after the break and could not discover any defect (p. 44). Evans, a witness for the International Mercantile Marine Company, also examined the rope after the break and found no defect. He says (p. 48):

> "Q. Could that kind of break be caused by defect in rope which was not discovered?
>
> "A. Well, I should say no; it looked in good condition."

Two and one-half tons is the limit of weights handled by T. Hogan & Sons (p. 36). If heavier cargo than that has to be discharged, Merritt-Chapman handle it. The weight of this automobile was close to the limit (pp. 36, 40). The automobile was contained in a case, making a package of 657 cubic feet and 4 inches (p. 69) and this case had square edges (pp. 36, 37).

In hoisting the case the sling, which is an endless rope formed by splicing together the ends, was put directly around the case (pp. 31, 32) and no blocks or battens of any kind were placed to prevent it from coming in contact with its sharp edges (pp. 36, 37).

A fall and hook were attached to the sling and the automobile was hoisted directly up from the ship's hold to the

deck (pp. 29, 33). As soon as it got above the combing of the hatch a hook attached to another tackle was fastened to the sling (p. 37). The boom to which the hoisting tackle was attached was stationary (p. 37), the second tackle being used to swing the case over the side of the ship where, in ordinary course, the hook attached to the hoisting tackle would have been unfastened, leaving the case suspended by the second tackle (pp. 37, 38). The sling broke just after the case cleared the ship's side, while the second tackle was still pulling sideways (p. 38) and the original hoisting tackle was still taut (p. 47).

There is no evidence that any more caution was used in the operation of the winches than would have been used in handling a lighter package. The witnesses are unable to state where the sling parted (33). *Mr. Evans states that the break in the rope was a much shorter break than is usual when a rope parts, indicating that pressure against the case had prevented the unravelling of the rope* (p. 48).

The Facts as to the American Express Company.

The inception of the negotiations for the shipment of the automobile to New York was a letter signed by the agent of the libellant (p. 68) delivered to the American Express Company, advising the Compaay that the libellant had decided to send his car by the Steamship "Minnewaska" from Southampton on December 24th, and that Mr. Reid's motor driver would make all arrangements (p. 70). Stevens, the motor driver, turned the automobile over to the Company to be packed, and signed and delivered to it two documents, the first of which is entitled "Shippers' Declaration" (opposite p. 70), and the second is entitled "Instructions for Shipment of Automobiles" (p. 71). The first is a request to ship the automobile to Stevens in New York for account of Mr. Ogden M. Reid, subject to the conditions printed on the back of the instrument. It states that no insurance is desired and described

the automobile, stating the value to be £800. The conditions are entitled " Conditions of Carriage and Insurance." These conditions are in part as follows (italics ours) (Opposite p. 71) :

> 1. " The shipment covered by this declaration is only accepted by the American Express Company as a Forwarding Agent for the shipper, *subject to conditions as to the limit of liability for loss or damage and all the rules, regulations and conditions* (printed, written or stamped) appearing in the tariffs, Bills of Lading, or receipts, of the different Railways, Transportation Companies, Steamers, Carriers and others through whose hands it may pass. All risk and responsibility of said American Express Company for loss, damage or delay to said property will cease on delivery in transit to such Railway, Transportation Company, Steamer, Carrier or others necessarily employed in the handling and transportation of the shipment from point of origin to destination. * * *.
>
> 2. " A copy of invoice and a declaration of contents and value must accompany every package * * *.
>
> " 22. It is understood and agreed that no goods shipped by or through this Company will be insured against General Average, perils of the sea, * * * unless shipper's special instructions to insure are written in the declaration form or advice note, premium paid in accordance with the kind of insurance required, and a Special Memorandum of Insurance covering such risks, is handed to the shipper by the Company. The Company's charges, unless insurance is effected, will cover transportation only * * *."

The instructions to ship signed by Stevens do not differ substantially from the request to ship contained in the shipper's declaration.

The Express Company caused the case containing the automobile to be transported by the London and Southwestern Railway Company from London to Southampton and there delivered to the International Mercantile Marine Company.

It paid the International £22-12 (p. 69) as freight for the transportation from Southampton and took the International's bill of lading. This bill of lading (p. 78) acknowledges the shipment of one case, automobile, to be transported by the "Minnewaska" to New York and there to be delivered to the American Express Company or its assigns. The measurement of said case is stated therein to be 657 cubic feet, 4 inches, and the freight is stated to be £22–12 or $109.61. Said bill of lading contains the following provisions:

> "It is also mutually agreed that the value of each package shipped hereunder does not exceed $100 or its equivalent in French currency on which basis the freight is adjusted, and the Carrier's liability shall in no case exceed that sum, unless a value in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid."

The value of the automobile was not stated in the bill of lading.

The International Mercantile Marine Company had a printed schedule of the rates charged by that Company for transportation from Southampton and London to New York (pp. 18 to 24, 16, 17, 25, 55). This schedule of freight rates covers automobiles in cases and fixes the freight rate solely according to measurement, no provision whatever being made for an *ad valorem* freight rate (pp. 18 to 24). The schedule shows three classes of freight rates, to wit, measurement, weight and *ad valorem*. Some articles take only a measurement rate, some only a weight rate and some a measurement or weight rate with an *ad valorem* rate at the vessel's option.

Mr. Potts, the General Traffic agent of the American Express Company in London, has testified at length as to the principles on which transatlantic rates are based.

In the case of every shipment the rate is fixed either according to measurement, weight or value, that is to say, the rate is

either so much per gross ton weight or so much per measurement ton of forty (40) cubic feet or an *ad valorem* charge (p. 53, *et seq.*). The value never enters into the fixing of the rate unless it is so high that the *ad valorem* rate based on value would exceed the weight or measurement rate. In such a case the *ad valorem* rate is charged, and no account is taken of weight or measurement. In all other cases the weight or measurement rate is charged, and no account is taken of value. Under such a system of fixing rates it is evident that the disclosure or failure to disclose the value of a shipment to the Steamship Company would not affect the rate unless the value were so great that an *ad valorem* rate would exceed the weight or measurement rate (p. 54).

In the present instance the value of the automobile being $4,000 an *ad valorem* rate of one-half per cent. (p. 54) would have given the Steamship Company only $20. An *ad valorem* rate of two and one-half per cent., that is to say, a higher *ad valorem rate* than is ever charged for any class of goods (p. 54) would have been necessary to make the *ad valorem* rate on this shipment equal the measurement rate actually charged, which was $109.61 (pp. 57, 78).

POINTS.

FIRST. The appeal by T. Hogan & Sons, Inc., opened the whole case so that the Circuit Court of Appeals had power to reverse the portion of the decree holding the Express Company liable.

SECOND. The Circuit Court of Appeals was right in holding that the Express Company was not liable for the damage to libellant's automobile.

THIRD. The District Court was right in holding T. Hogan & Sons, Inc., liable for the damage to libellant's automobile.

POINT I.

The appeal by T. Hogan & Sons, Inc., opened the whole case so that the Circuit Court of Appeals had power to reverse the portion of the decree holding the Express Company liable.

The decision in *Irvine vs. Hesper*, 122 U. S., 256, finally settled the principle that an appeal from the District Court to the Circuit Court taken by either party in an admiralty case opens the whole case.

In *Irvine vs. Hesper* the District Court awarded $8,000 salvage to the libellants who appealed to the Circuit Court. The Circuit Court reduced the award to $4,200 ; the libellants then appealed to this Court which affirmed the decree of the Circuit Court saying :

> " The claimants not having appealed to the Circuit Court, it is suggested that they are liable for at least

> the amount awarded by the District Court and that the Circuit Court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that on appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. *Yeaton vs. United States*, 5 Cranch., 281; *Anonymous*, 1 Gallison, 22; *The Roarer*, 1 Blatchford, 1; *The Saratoga v. 438 Bales of Cotton*, 1 Woods, 75; *The Lucille*, 19 Wall., 73; *The Charles Morgan*, 115 U. S., 69, 75. We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule, and took the risk of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

Irvine vs. Hesper only reaffirmed and applied a principle which had been repeatedly laid down in previous cases.

In *Yeaton et al. vs. The United States*, 5 Cranch., 281, Chief Justice MARSHALL delivering the opinion of the Court said:

> "The majority of the Court is clearly of opinion that in admiralty cases an appeal suspends the sentence altogether and it is not *res adjudicata* until the final sentence of the Appellate Court is pronounced. The cause in the Appellate Court is to be heard *de novo* as if no sentence had been passed. This has been the uniform practice not only in case of appeals from the District Court to the Circuit Court of the United States but in this Court also."

The Court held that because of the expiration of the Act under which a vessel had been seized, libelled and condemned pending appeal from the Circuit Court to the Supreme Court, the penalty imposed by the Act could not be enforced.

In the *Lucille*, 19 Wallace 73, Mr. Justice MILLER, delivering the opinion of the Court said:

> "An appeal in admiralty has the effect to supercede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or, if asked for is contemplated, a trial in which the judgment of the Court below is regarded as though it never had been rendered."
>
> See also *The Charles Morgan*, 115 U. S., 69.

The Supreme Court prior to the limitation of its jurisdiction in 1876 exercised the same power upon an appeal to it from the Circuit Court in an admiralty case that the Circuit Court exercised upon an appeal from a District Court. The hearing in the Supreme Court was a trial *de novo*.

Yeaton vs. United States, 5 Cranch., 281.
The Connemora, 108 U. S., 352 to 360.

In *Munson S. S. Line vs. Miramar S. S., Ltd.*, 167 Fed. Rep., 960, the Circuit Court of Appeals for the Second Circuit considered the question whether the principle stated in *Irvine vs. Hesper (supra)*, applied to an appeal from the District Court to the Circuit Court of Appeals. The conclusion reached was as follows:

> "We are of opinion that this Court stands with relation to the District Court exactly as the Supreme Court before the Act of 1875 stood in relation to the Circuit Court. The appeal is still a new trial in this Court, subject to the regulations before mentioned and we have power to modify the decree of the District Court as the Supreme Court had between 1803 and 1876."

The Court acted upon the conclusion thus stated by directing a decree more favorable to the Appellee than the decree of the Court below. An application was made to this Court

for a writ of *certiorari*, but the application was denied (214 U. S., 523).

It is suggested in the brief filed on behalf of the petitioner that there is a distinction between this case and the case of *Munson S. S. Line vs. Miramar*. The basis for a distinction is supposed to be found in the fact that here the appeal was not taken by the libellant but by respondents brought in by petition, who are assumed to be in the position of respondents brought in to answer a cross-libel. But the International Mercantile Marine Company and Hogan & Sons, Inc., were not in the position of respondents to a cross bill, but were co-respondents with the Express Company in the original suit. In the *Galileo*, 29 Fed., 538, a libel had been filed against two vessels for damages caused by collision. The District Court dismissed the libel as to one and awarded the libellants their whole damages against the other. On appeal to the Circuit Court the decree of the District Court was reversed and both vessels held in fault. It was held that the libellants were entitled to a decree against both vessels, although the appeal taken by them had been abandoned. In the case of the *Umbria*, 59 Fed. Rep., 489, the Circuit Court of Appeals of the Second Circuit followed and applied the rule of the *Galileo*.

It is submitted that the rule of practice upon which the Court acted in *Munson S. S. Line vs. Miramar S. S. Co. Ltd.*, and which this Court did not see fit to disapprove when an application was made for a writ of *certiorari* should not now be disapproved. It has become a settled rule of practice at least in the Second Circuit.

POINT II.

The Circuit Court of Appeals was right in holding that the Express Company was not liable for the damage to libellant's automobile.

The Express Company did not undertake to transport the automobile to New York nor did it assume the obligations of a common carrier with respect to it. What it undertook to do was to attend to the packing of the automobile, its transportation to Southampton, and its shipment there for New York (See Shipper's Declaration opposite Page 70. Conditions of carriage and insurance, Pages 72, etc.). After its delivery to the Steamship Company the Express Company did not have and was not expected to have dominion or control over it.

The contention that the Express Company is liable for the damage rests upon the assumption that in failing to declare to the Steamship Company the value of the automobile, it was derelict in some duty which it owed to the libellant. It is not claimed that there was any express undertaking on the part of the Express Company to declare the value to the Steamship Company, but it is argued that such an undertaking must be implied from the fact that notice of the value was given to the Express Company. It is said that the failure of the Express Company to observe this implied undertaking has deprived the shipper of recourse against the Steamship Company for the damage in excess of $100, and that, therefore, the Express Company is to be held liable for such excess. The position of the Express Company is: (*a*) There was no implied obligation on its part to declare the value of the automobile to the Steamship Company; (*b*) The $100 limitation contained in the Steamship bill of lading was not applicable to libellant's automobile.

(*a*) The "Conditions of Carriage and Insurance," setting out the understanding on which the shipment was accepted by the Express Company, provide that the shipment was accepted by the Company as a forwarding agent only subject to the conditions as to the limit of liability for loss or damage that might appear in the bill of lading of the Steamship Company and also provided that a declaration of contents and value must accompany every package (See Conditions of Carriage and Insurance, opposite page 71, Sections 1 and 2).

It is submitted that "The Conditions of Carriage and Insurance" contemplate that the value of every package shall be disclosed to the Express Company, and at the same time contemplate that a package may be forwarded subject to the condition as to limit of liability in the Steamship bill of lading. Inasmuch as the disclosure of value must always be made, the provision making the shipment subject to the Steamship bill of lading condition as to the limit of liability would be nullified if the disclosure of value to the Express Company made it inapplicable. The disclosure of the value to the Express Company therefore did not impose upon the Express Company any obligation to declare the value to the Steamship Company.

This conclusion is borne out by other provisions of the "Shipper's Declaration" and the "Instructions for shipment of automobiles." The theory of these documents is that a shipper who wishes insurance must state the fact and pay the proper premium to the Express Company. If he elects not to insure through the Steamship Company the presumption is that he has obtained satisfactory protection elsewhere and will not be affected by the limit of liability contained in the steamship bill of lading. The shipper has the election to pay more and get full protection or to pay less and get a minimum of protection. The shipper here, having expressly elected not to take insurance cannot complain of the inade-

equacy of the protection which the Express Company obtained for him.

(*b*) The limitation clause contained in the bill of lading provides that "The value of each package shipped hereunder does not exceed $100 or its equivalent in English money *on which basis the freight is adjusted, etc.*"

It is submitted that this clause was not intended to apply and does not apply to shipments on which the rates are fixed on a basis other than value. When it is manifest that the rate on a shipment would not be in any way affected by disclosure of its value an agreement fixing the limit of liability at anything less than the true value of the goods would be purposeless from the shippers' point of view and there would be no consideration to support it.

In *Hart vs. Pennsylvania Railroad Company*, 112 U. S., 331, Mr. Justice BLATCHFORD said:

> "The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, *with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation*, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

In *Missouri Pacific Railroad Company vs. Harper Brothers*, 201 Fed., 671, at page 674, the Court said:

> "And so, if a valuation of goods is made in good faith, whether proposed by the shipper or by the carrier, and if the rate is based on such valuation, the agreed value is the measure, not of the liability for the loss, but of the amount of the loss."

In the Pierce Company vs. Wells Fargo & Company, 236 U. S., 278, 284, the Court said :

> " The facts detailed show that there was nothing unfair in the contract. It was made between competent parties, dealing at arms' length, and for the purpose, so far as the shipper was concerned, of securing the lower rate, it deliberately took upon itself the risk of lessened recovery in case of loss for the sake of the lower rate."

The evidence in this case shows that the rate of freight exacted by the Steamship Company was based on the cubic measurement of the case containing the motor car and that the declaration of the value of the car to the Steamship Company could not have affected the rate (folios pp 75 52 53 6).

POINT III.

The District Court was right in holding T. Hogan & Sons, Inc., liable for the damage to libellant's automobile.

The admission of T. Hogan & Sons, Inc., that the automobile while in their custody fell into the water is enough to sustain the charge of negligence against them in the absence of a satisfactory explanation that the fall of the car was attributable to some cause for which they were not responsible.

Island & Seaboard Coasting Company vs. Tolson, 139 U. S., 551, 555.
Sweeney vs. Erving, 228 U. S., 233.
Marceau vs. Rutland R. R. Co., 211 N. Y., 203.

The explanation they offer is that the accident was due to the breaking of the sling and that the sling was furnished by

the Steamship Company. They say that the break was attributable to a defect in the rope for which they are not responsible. *But the evidence is that there was no defect in the rope* (pp. 31, 33, 34, 44, 48).

The necessary inference is that the break was due to a lack of the degree of care in the manipulation of the tackle and the working of the winches that the circumstances called for (pp. 29, 33, 37, 38, 47). When it is considered that the weight of the case was very near the maximum weight for which the tackle was used (pp. 36, 40); that the rope was put around the sharp edges of the case without blocks or other protection (pp. 36, 37); that the sling broke when two falls were hooked to it, one connected with the fixed boom over the hatch and the other connected with the boom on the dock and both pulling in different directions (pp. 37, 38, 47) the strain being released on one as it was increased on the other (p. 47) the chance of a failure to maintain at all times the necessary degree of care is patent.

POINT IV.

The decision of the Circuit Court of Appeals in so far as it finds that the Express Company is not liable should be affirmed. If the decision of the Circuit Court of Appeals is reversed the decision of the District Court in so far as it holds T. Hogan & Sons, Inc., primarily liable should be affirmed.

WALTER F. TAYLOR,
Advocate for James C. Fargo as President
of the American Express Company.

[14417]

8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 279

OGDEN M. REID, Petitioner

vs.

JAMES C. FARGO, as President of the American Express Company, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR INTERNATIONAL MERCANTILE MARINE COMPANY

BURLINGHAM, MONTGOMERY & BEECHER
Proctors for International Mercantile Marine Company

ROSCOE H. HUPPER
NORMAN B. BEECHER
Of Counsel

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LIST OF CASES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 279

OGDEN M. REID,
(Libellant-Appellee) Petitioner,

AGAINST

JAMES C. FARGO, as President of the American Express Company,
(Respondent-Appellee) Respondent,

AND

INTERNATIONAL MERCANTILE MARINE COMPANY, Impleaded,
(Respondent-Appellee) Respondent,

AND

T. HOGAN & SONS, INCORPORATED, Impleaded,
(Respondent-Appellant) Respondent.

BRIEF FOR INTERNATIONAL MERCANTILE MARINE COMPANY

STATEMENT

This is a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. The opinion of Ward, *C. J.*, is at page 84 of the Record.

We shall speak of the parties as Reid, the Express Company, the Steamship Company, and Hogan, respectively.

On November 21, 1911, Reid filed his libel against the Express Company in the District Court for the Southern District of New York to recover $3,500 alleged damage to his Peerless motor car, which he had shipped to New York from London by the Express Company in December, 1910. The Express Company had in turn shipped the car by the Steamship's Company's steamship *Minnewaska*. The automobile fell overboard at New York on January 5, 1911, while being unloaded from the *Minnewaska* by Hogan, the stevedore employed by the Steamship Company.

The libel proceeded on the theory that the American Express Company "agreed safely to carry by steamer to New York and there deliver to the libellant or order" the motor car in question, and alleged that the Express Company "did not safely carry or deliver the said goods pursuant to said agreement" (2).*

The Express Company answered the libel February 1, 1912, setting up that it "received said motor car as the forwarding agent of the shipper and agreed with him to deal with said motor car in accordance with the instructions of the shipper, but subject to the terms and conditions forming a part of said instructions and defining the liability of said Company," among which was stated to be a provision to the effect that the shipment was accepted by the Express Company only as a forwarding agent, subject to the bills of lading of other carriers, and that the responsibility of the Express Company ceased on delivery to the carrier employed in

*All references are to pages of the Record.

the transportation of the shipment (4). The answer further alleged that the Express Company delivered the car to the Steamship Company at Southampton, England, December 24, 1910, in the same condition it was received, taking a bill of lading for transportation to New York by the Steamship *Minnewaska,* whereupon the Express Company "had entirely performed its obligation" (5).

The Express Company had on January 24, 1912, filed a petition against the Steamship Company under Rule 59 in Admiralty of this Court, and Rule 15 of the Admiralty Rules for the Southern District of New York in analogy therewith. (See Appendix.) This petition set forth the delivery of the automobile in good order and condition to the Steamship Company at Southampton on December 24, 1910, and the payment of $109.61, for which it alleged that the Steamship Company by a bill of lading "agreed with the American Express Company to carry and transport * * * the said automobile, and to deliver the same at New York unto the American Express Company, in like good order and condition as when received" (7); that the Steamship Company did not safely deliver the automobile to the Express Company at New York, but, on the contrary, delivered it in a badly damaged and almost worthless condition, alleged to have been due to the negligence of the Steamship Company and its employees in allowing the automobile to fall overboard while being discharged from the *Minnewaska* (8).

The Steamship Company answered the Express Company's petition and the libel March 1, 1912. The answer to the petition admitted the receipt from the Express

Company of "one case said to contain an automobile, condition, contents and value unknown, for which it issued its bill of lading" (9). It also admitted that while in the possession of the Steamship Company "said case sustained damage". It then alleged that the bill of lading contained the following provisions:

"1. It is also mutually agreed that the value of each package shipped hereunder does not exceed $100 or its equivalent in English currency on which basis the freight is adjusted, and the carrier's liability shall in no case exceed that sum unless a value in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid."

"And finally, in accepting this bill of lading, the Shipper, Owner, and Consignee of the goods, and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed as fully as if they were all signed by such Shipper, Owner, Consignee or Holder" (9).

The answer further alleged that no value in excess of $100 was declared and no extra freight paid, and that the liability of the Steamship Company did not exceed $100, which it had tendered to the Express Company and for which it offered to allow a decree to be taken against it (9-10).

On these pleadings issue was joined March 14, 1912.

November 27, 1912, the Express Company filed a second petition, against Hogan, alleging that the Steamship Company had employed Hogan to unload the automobile and that Hogan "negligently allowed the case containing said automobile, when it was suspended in air by a tackle or other contrivance, to fall therefrom into the Hudson River in New York Harbor, thereby sustain-

ing the damage of which Ogden M. Reid complains in this suit" (13).

Hogan answered the libel and the Express Company's petition December 26, 1912, alleging that "the operation of unloading was conducted with all reasonable care and this respondent and its employees were not guilty of any negligence, yet, through no fault of theirs, the sling in which the automobile was suspended broke and said automobile fell into the Hudson River. Said sling was not the property of this respondent but was furnished to it by those who employed this respondent to unload the vessel" (14-15).

At the trial March 25, 1913, Reid offered in evidence an agreed statement of facts (68-9), which included by reference the "Conditions of Carriage and Insurance" which had been delivered to him by the Express Company, as well as the Steamship Company's bill of lading which the latter delivered to the Express Company. From this agreed statement it appears that no declaration of value in excess of $100 was made to the Steamship Company otherwise than in the bill of lading, and that it had no knowledge of the transactions between Reid and the Express Company (69). A certain "specification" for Custom House purposes which purported to show the value as £800 was delivered to the Steamship Company on December 30, 1910, six days after the bill of lading was issued and after the *Minnewaska* sailed for New York (25, 69).

The conditions of carriage delivered to Reid by the Express Company contained a clause providing:

"8. It is further agreed that this Company is not to be held liable or responsible for any loss of or damage to

said property, or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said Company or its servants" (74).

A further clause provided:

"12. And it is also understood that the stipulations contained herein shall extend and inure to the benefit of each and every company or person to whom, through this Company, the within described property may be entrusted or delivered for transportation" (74).

Judge Veeder wrote no opinion, but on March 28, 1913, made an interlocutory decree providing that the libellant recover from Hogan and the Express Company, and that upon the assessment of the damages the libellant have judgment against Hogan in the first instance and against the Express Company "in the event and to the extent that libellant is unable to collect, upon execution, the amount of the judgment hereinbefore directed to be entered in the first instance" against Hogan (64). As to the Steamship Company this decree provided:

"Further ordered, adjudged and decreed, that the petition of the respondent James C. Fargo, as President of the American Express Company, impleading the International Mercantile Marine Company as a party respondent herein, be, and the same hereby is, dismissed" (64).

The final decree, entered July 24, 1913, adjudged that the libellant recover from Hogan damages of $2,724.40, with interest and costs, amounting to $3,377.75. This decree further provided that Reid recover from the Express Company whatever portion of the judgment entered against Hogan it should be unable to collect from Hogan upon execution. This decree did not mention the Steam-

ship Company, which had been wholly dismissed from the suit by the decree of March 28, 1913 (65-6).

Hogan alone appealed from the final decree of July 24, 1913, making no reference to the decree of March 28th (66-7). The Express Company did not appeal from the decree of March 28, 1913, which dismissed its petition against the Steamship Company, nor did it appeal from the decree of July 24th, which held it liable to the extent that execution should not be satisfied by Hogan.

The Circuit Court of Appeals held that the appeal was a new trial as to every party; that no negligence had been established against Hogan; that the Express Company was a mere forwarding agent, not liable for any negligence of the Steamship Company or of Hogan; that the Steamship Company stood in the relation of carrier to Reid, and that as it was an insurer and there was no exception covering the loss it must be held liable, but only to the extent of $100 under its bill of lading clause above quoted. The court refused to follow Reid's suggestion that the Express Company, having notice that the car was worth £800, was negligent in failing to arrange with the Steamship Company to carry it at that value, for the reason that no such ground of liability had been charged in the libel. It reversed the decree of the District Court of July 24, 1913, and directed that Court to enter a decree "dismissing the libel against the American Express Company with costs of both courts, and dismissing the petition bringing in T. Hogan & Sons with costs of both courts against the American Express Company, and awarding the libellant the sum of $100 to be paid by the Steamship Company with costs of both courts to the Express Company" (84-6).

Questions Presented

The case being here on *certiorari*, this Court has power both to review the action of the Circuit Court of Appeals and to direct such a disposition of the case as that Court might have done. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267; *Delk* v. *St. Louis & San Francisco R. R.*, 220 U. S. 580, 588-9; *Gompers* v. *United States*, 233 U. S. 604. We shall therefore attack the decision of the Circuit Court of Appeals (except as to limitation of liability) on every ground.

For the Steamship Company we shall argue:

a. That the Circuit Court of Appeals had no power to direct a decree against the Steamship Company because that Company had been wholly dismissed from the suit by the decree of March 28, 1913, which as to that dismissal was a final decree, from which no appeal had been taken, and the appeal of Hogan alone from the decree of July 24, 1913, did not inure to the benefit of either Reid or the Express Company as against the Steamship Company.

b. That if the Circuit Court of Appeals properly found Hogan not chargeable with negligence the Steamship Company should likewise have been relieved from liability by virtue of the provisions of the "Conditions of Carriage" delivered to Reid by the Express Company.

c. That the Circuit Court of Appeals was right in limiting the liability (if any) of the Steamship Company to $100.

FIRST POINT

THE CIRCUIT COURT OF APPEALS HAD NO POWER TO DIRECT A DECREE AGAINST THE STEAMSHIP COMPANY.

The Express Company asserts that the decision of this Court in *Irvine* v. *The Hesper*, 122 U. S. 256, justified the Circuit Court of Appeals in reversing that part of the decree holding the Express Company liable. It does not assert that this decision or any other gave the Circuit Court of Appeals authority to direct a decree against the Steamship Company. Neither does Reid make such a contention, nor does Hogan. It is obvious that the Circuit Court of Appeals went much further than it did in *Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed. Rep. 960.

We do not dispute that an appeal in admiralty in the Second Circuit is a new trial. But it can be a new trial only for those who put themselves in the position to avail of it as such. Since neither Reid nor the Express Company appealed from either decree, and since Hogan appealed only from the decree of July 24th, and had no interest whatever in securing a reversal of the decree of March 28th as to the Steamship Company, none of the parties could avail of, nor could the Court entertain, a new trial as against the Steamship Company.

Irvine v. *The Hesper* (*supra*) held that the appeal of a libellant for an increased salvage award gave the Circuit Court power to decrease the award notwithstanding that the claimants had not appealed. Of this case Wal-

lace, *C. J.*, said in *Shaw* v. *Folsom*, 40 Fed. Rep. 511, 512:

"The libellant cites the case of *The Hesper*, 122 U. S. 256, 7 Sup. Ct. Rep. 1177, and insists that the appeal of the charterer opens the whole case, and authorizes the court to decree in his favor beyond the sum awarded by the district court. I do not understand that the supreme court, in that case, intended to overthrow the long-established rule, repeatedly declared by it, that the party to an admiralty cause, or to an equity cause, who does not appeal, can only be heard in support of the decree of the court below. *Chittenden* v. *Brewster*, 2 Wall. 191; *Stratton* v. *Jarvis*, 8 Pet. 4; *The William Bagaley*, 5 Wall. 412; *The Quickstep*, 9 Wall. 665; *The Stephen Morgan*, 94 U. S. 599. That case was a suit for salvage; and while it decides that an award to a salvor who appeals may be reduced, although the adverse party does not appeal, it decides nothing more; and it is not to be supposed that the court would overrule its previous decisions without saying so, or without referring to them."

Somewhat similar to *Irvine* v. *The Hesper* were *The Galileo*, 29 Fed. Rep. 538, and *The Umbria*, 59 Fed. Rep. 189, decided in the Second Circuit. Each of these two cases was a suit against two vessels for collision damages. In each case the District Court dismissed the libel against one vessel and held the other liable. In each case, on appeal by the vessel held, both vessels were held liable, notwithstanding that the libellants had not appealed. Of these decisions it was said in *Munson S. S. Line* v. *Miramar S. S. Co.*, *supra*, at page 964, that this was necessary to protect the appellant—this by virtue of the rule of *The Alabama*, 92 U. S. 695, and *The Atlas*, 93 U. S. 302. If an appellant were found wholly free from fault, such a decision would also be necessary to protect the libellant.

In the case at bar no such justification can be given for a decree against the Steamship Company. Hogan did not require the protection of such a decree. He had been brought into the suit by the Express Company, and his interest ceased on being found not negligent.

As to Reid, he had no interest in appealing, since he had a decree in his favor for the full amount of his damages, which ran against the Express Company for such part of the damages as he might not be able to collect from Hogan. He therefore needed no protection. If on any possible theory a decree against the Steamship Company could be supposed necessary for his protection, it must be observed that he desired only to pursue the Express Company for its negligence as a forwarding agent and expressly reaffirmed this position in his petition for a rehearing (89). It is obvious that not even liberal admiralty practice could create for Reid rights against the Steamship Company for which his libel was not framed and which he did not seek.

The dismissal of the Steamship Company from the suit by the decree of March 28, 1913, was a dismissal not as against Reid, but as against the Express Company, which had made it a party solely because of the bill of lading contract between the Steamship Company and the Express Company. The Steamship Company could not be regarded as jointly liable with the Express Company. Reid neither sought the responsibility of the Steamship Company, nor could the Express Company dispose of Reid's claim by turning him over to pursue the Steamship Company. The utmost the Express Company could hope to accomplish by its petition was to secure indemnity (much or little) on its contract with the Steamship

Company against its liability to Reid on its own contract with him.

The effect to be given these considerations is established beyond all question by the decisions of this Court. In *Hill* v. *Chicago & Evanston R. R. Co.*, 140 U. S. 52, a bill in equity was by a decree of June 8, 1885, dismissed as against certain of the defendants named, and the case was retained as to other defendants. The complainant took an appeal, which because not perfected was dismissed. The case was disposed of as to the other defendants by a decree of July 14, 1887, and on appeal from the latter decree the complainant sought to review the dismissal of certain defendants by the former decree. This Court held that the decree of June 8, 1885, was final, and Mr. Justice Field said, page 54:

"We are of the opinion that the decree of June 8, 1885, was a final decree, within the meaning of that term in the law respecting the appellate jurisdiction of this court, as to all matters determined by it, and that they are closed against any further consideration. It disposed of every matter of contention between the parties, except as to the amount of one item, and referred the case to a master to ascertain that. * * *

"As to the other parties, it remained to ascertain the amount of one item and to determine as to its payment. The decree of July 14, 1887, covered that matter, and finally disposed of it. The decree of June 8, 1885, was appealable as to the matters which it fully determined; so also was the decree of July 14, 1887, as to the severable matter which it involved."

This decision makes it clear that the decree of March 28, 1913, in the case at bar was final as to the dismissal of the Steamship Company from the suit. There being no appeal from that decree by any party the dismissal

was not open to review in the Circuit Court of Appeals. See also *Jackson* v. *Jackson*, 175 Fed. Rep. 710, 715.

If the Steamship Company had been charged jointly with the Express Company and Hogan in the libel it might be argued that the appeal would have opened the record for a decree against it. See *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, 266; *Ex Parte National Enameling Co.*, 201 U. S. 156, 165; *Sheppy* v. *Stevens*, 200 Fed. Rep. 946, 948. See also *Hume* v. *Frenz*, 150 Fed. Rep. 502, 504. But the respondents are not charged jointly, and the real contest is not a contest between the respondents with respect to the same act or ground of liability. The only respondent charged by Reid was the Express Company, and the respensibliity was based on the contract between those parties. The Express Company charged the Steamship Company separately by virtue of another distinct contract between those two parties. The Express Company charged Hogan separately for his negligence.

But if Hogan's appeal from the decree of July 24th raised a contest between respondents merely, that contest was only between Hogan and the Express Company and the Steamship Company was no party to it, because it had long since been dismissed by the decree of March 28th.

In any view of the authorities, therefore, the Circuit Court of Appeals should not have directed a decree against the Steamship Company. Whether it should have reversed as to the Express Company is another question. Certainly the rules of the Circuit Court of Appeals with respect to appeals (see Appendix) did not require such a reversal. That Reid's libel charged the

Express Company for negligence as a forwarder, and not as a carrier, was probably insufficient ground for reversal; the defect did not prejudice the Express Company, in view of its own plea that it was a forwarder. In *Grant Bros.* v. *United States*, 232 U. S., 647, 661, Mr. Justice Van Devanter said it would be "most unreasonable" to reverse the judgment for a defect by which the defendant had not been prejudiced. Notwithstanding its contention that it was a forwarder only and ended its obligation by delivering the car to the Steamship Company, the Express Company may still have remained a carrier as to Reid by taking the bill of lading in its own name. Its petition against the Steamship Company complained that the car had not been redelivered to it (not to Reid) in good order at New York. But we shall not argue these points.

SECOND POINT

IF THE CIRCUIT COURT OF APPEALS WAS CORRECT IN HOLDING HOGAN FREE FROM NEGLIGENCE IT SHOULD ALSO HAVE RELIEVED THE STEAMSHIP COMPANY.

We believe it far from clear that the Circuit Court of Appeals did not err in finding Hogan not chargeable with negligence. The testimony was uncontradicted that his men had entire charge of the unloading, that they gave orders to the winchmen and that the winches were operated by his employees (29, 38, 46). The rope was placed about the case by Hogan's

men, but no blocks were placed to protect the rope from the square edges of the case (35-7). The case had been hoisted out of the hold some forty feet, the rope proving entirely sufficient to stand the strain. It was only when the case had come above the level of the deck and had been pulled sideways until clear of the ship's side that the rope parted (37-8). The break in the rope was a great deal shorter than is usual when a rope parts, probably because of the pressure of the rope up against the case (47-8).

The mere breaking of a rope does not in any case raise a presumption that it was defective. Hogan proved very conclusively upon the trial that this rope was entirely sound and of sufficient size and strength. His foreman, Nelson, testified that he examined the rope after it broke and that "it looked like good rope"; "the rope was good, though, as good as new rope" (30, 37); that in single strand the rope would hold five tons and doubled ten tons; that the case weighed only about 5,300 pounds (34-5).

The only fair inference from the evidence is that the accident was due to the cutting of the rope on the unprotected edges of the case, or to undue strain put upon the sling in pulling the case sideways across the deck. If the rope parted because it was cut by the unprotected edges of the case the condition of the break would be fully explained. Although Hogan's gangwayman testified that there were no jerks (47), Hogan's winchman was not produced (38). No sufficient explanation having been given, it would seem that Hogan must be held. *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 98-9.

If Hogan was negligent the Circuit Court of Appeals erred in reversing the decree of the District Court.

But even if the Circuit Court of Appeals correctly held that Hogan was not negligent, then by the same token the Steamship Company should have been held not liable. This is because of the provisions in the Express Company's conditions of carriage (quoted *supra*, pp. 5-6), whereby it was not to be held liable for damage from any cause whatever unless "proved to have occurred from the fraud or gross negligence of said Company," and whereby this provision inured to the benefit of the Steamship Company.

If Hogan was not negligent that relieved the Express Company from liability, and it therefore could have no claim against the Steamship Company.

If notwithstanding the pleadings Reid be regarded as claiming against the Steamship Company, it cannot be doubted that the Steamship Company can avail itself against him of this contract made for its benefit, *Hendrick* v. *Lindsay*, 93 U. S. 143, and particularly by way of release from liability, *Robinson* v. *Balt. & Ohio R. R.*, 237 U. S. 84; *Balt. & Ohio Ry.* v. *Voigt*, 176 U. S. 498. No more can it be doubted that by these provisions of the Express Company's conditions of carriage the Steamship Company was divested of its insurer's liability both as to Reid and the Express Company and remained responsible only for such negligence as should be proved against it. So long as the stipulation does not purport to avoid liability for negligence, it is no objection that the burden of proof is placed on the shipper. In *Navigation Co.* v. *Merchants Bank*, 6 How. 344, 384, Mr. Justice Nelson said:

"The respondents having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care, or by gross negligence, lies on the libellants, which would be otherwise in the absence of any such restriction. We have accordingly looked into the proofs in the case with a view to the question."

See also *Clark* v. *Barnwell*, 12 How. 272; *York Co.* v. *Central R. R.*, 3 Wall. 107; *The Folmina*, 212 U. S. 354, 362.

No actual negligence of the Steamship Company itself was suggested or shown, and the only negligence imputable to it would be that of Hogan. If Hogan was negligent he, and not the Steamship Company, must bear the loss. If Hogan was not negligent that fact of itself must discharge the Steamship Company.

If either of the foregoing points is well taken that is an end of the case as to the Steamship Company. We deem it proper, nevertheless, to state the considerations supporting the decision of the Circuit Court of Appeals with respect to the Steamship Company's contract for limited liability, against the possibility that this Court may determine that the Circuit Court of Appeals was right in holding the Steamship Company liable to some extent.

THIRD POINT

THE CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE STEAMSHIP COMPANY'S LIABILITY, IF ANY EXISTED, WAS LIMITED TO ONE HUNDRED DOLLARS BY THE TERMS OF ITS BILL OF LADING (*supra*, p. 4).

The motor car was packed in a case which was entirely enclosed, and measured 657 cubic feet 4 inches. The freight paid the Steamship Company by the Express Company for a package of that measurement was $109.61. No value was stated to the Steamship Company in excess of $100, which was stated in the bill of lading to be the basis on which the freight was adjusted (69). The Express Company knew the value to be £800, but was apparently content to fix the value at $100 with the Steamship Company (69). The contents of the case, though stated to be an automobile, were in fact unknown to the Steamship Company. The bill of lading recites the shipment of "one case automobile * * * condition, contents and value unknown" (78).

The bill of lading was issued at Southampton, December 24, 1910, to the Express Company, and by the Express Company alone is any claim under it made against the Steamship Company. The Steamship Company was not in privity with Reid and Reid's libel sets up no contract with or claim against the Steamship Company. On the contrary, in his petition for rehearing, Reid expressly reaffirmed that his claim was against the Express Company by reason of its having failed to carry out its contract as a forwarding agent.

The Express Company must be presumed to be familiar with bills of lading and limitation of liability clauses. That is sufficiently established by its own conditions of carriage in evidence (70).

From the *Hart* case down to the *Pierce* case this Court has consistently upheld limited liability contracts of this character, and we merely refer to the authorities. *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469; *Kansas So. Ry.* v. *Carl*, 227 U. S. 639; *Mo., Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657; *Great Northern Ry.* v. *O'Connor*, 232 U. S. 508; *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97; *Atchison, etc., Ry. Co.* v. *Robinson*, 233 U. S. 173; *Pierce* v. *Wells, Fargo & Co.*, 236 U. S. 278. See also *Hohl* v. *Norddeutscher Lloyd*, 175 Fed. Rep. 544.

Reid does not here urge any serious objection against the Steamship Company's limited liability, but contends rather that the Express Company was negligent in failing to declare the value of the shipment to the Steamship Company. In this he seems well advised under *Great Northern Ry. Co.* v. *O'Connor*, *supra*, at pages 514-15.

But the Express Company contended in the Circuit Court of Appeals and contends here that the freight charge was not in reality based on valuation. To this it is a sufficient answer that the bill of lading accepted by the Express Company provided that the freight was adjusted on the basis of a value not over $100. In *Hart* v. *Pennsylvania Railroad Co.*, *supra*, page 337, Mr. Justice Blatchford said:

"It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and

especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. * * * The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight."

In *Adams Express Co.* v. *Croninger*, *supra*, at pages 508-9, Mr. Justice Lurton said:

"That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission. That presumption is strengthened by the fact that across the top of this bill or lading there was this statement in bold type, 'This Company's charge is based upon the value of the property, which must be declared by the shipper.'"

In *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, *supra*, at pages 476-7, the same learned Justice also said:

"But the shipper in accepting the receipt reciting that the company 'is not to be held liable beyond the sum of fifty dollars, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated,' did declare and represent that the value did not exceed that sum, and did obtain a rate which he is to be assumed to have known was based upon that as the actual

alue. There is no substantial distinction between a alue stated upon inquiry, and one agreed upon or declared voluntarily. The rate of freight was based upon he valuation thus fixed, and the liability should not exeed the amount so made the rate basis."

In *Pierce Co.* v. *Wells, Fargo & Co., supra,* at page 83, it expressly appears from the opinion of Mr. Justice Day that a limitation clause similar to that involved in his case gave the shipper the privilege of having liability for the full value of the goods by paying an increased ate. In that case a limitation of $50 was sustained as gainst a loss of $20,000.

There can be no valid objection on the ground that nerely a printed form was used. In *Great Northern Ry.* v. *O'Connor, supra,* at pages 515-16, it was said:

"In view of the multitude of transactions, it is not ecessary that there shall be an inquiry as to each article r a distinct agreement as to the value of each shipment. * * Nor was the result changed because of the use f printed forms."

The stipulation for limited liability is not affected by he fact that the Steamship Company's printed schedule imes only one rate. As Mr. Justice McKenna said in *au* v. *Tex. & Pac. Ry. Co.*, 194 U. S. 427, 431-2:

"In other words, the consideration expressed in the ll of lading was sufficient to support its stipulations. his effect is not averted by showing that the defendant id only one rate. It was the rate also of all other roads, id presumably it was adopted and offered to shippers in ew of the limitation of the common law liability of the oads."

The bill of lading contemplates that if an excess alue is declared, "*extra* freight as may be *agreed* n" shall be paid—not that the regular freight rate shall

be altered. It is only the regular freight rate (*i. e.*, the rate based on a valuation not over $100) which the Steamship Company's schedule purports to show (18-24). "The steamship companies have a right to demand any rate they can get," as Mr. Potts, the Express Company's witness, testified (60). Unlike carriers by railroad in the United States, subject to the Interstate Commerce Act, the Steamship Company was not confined to the rates published in its schedule. The schedule itself provides that automobile shipments must be specially arranged (24). There is nothing unlikely in the proposition, and it is entirely consistent to assume, and must be presumed, that the measurement rate of 25 shillings and 10 per cent. in the schedule is based on the agreement, evidenced by the bill of lading, that the value does not exceed $100.

The freight rate need not be measured directly and immediately on the $100 value. That would require that every article be carried at an *ad valorem* rate, would disregard entirely the varying bulk of different packages of the same value, and would deprive the Steamship Company of all compensation for the extra space consumed by bulky articles. No steamship company could conduct its business on such a basis. The freight rate is just as truly measured by the agreed value of $100, if that agreed value is the basis upon which the Steamship Company agrees to charge its measurement rate. Value and bulk are bound to be concurrent factors in the amount of freight charged for a particular package. To say that bulk is a factor is not to suggest that value is not the factor the contract says it is.

The Express Company, indeed, sought to show that if the value of this shipment had been declared to the

Steamship Company the freight at *ad valorem* rates would have been less than the freight actually charged by the Steamship Company. This contention goes altogether too far for the Express Company's own purpose. If by declaring value a lower rate could have been secured, why did not the Express Company so declare and thereby secure for itself a greater margin of profit out of the $150 paid to it by Mr. Reid? Yet Mr. Potts stated positively that he had never known of a steamship line being notified of the value of an automobile shipped (56). This gives the Express Company's contention an answer, namely, that the automobile could not have been shipped at such an *ad valorem* rate as Potts suggested—*i. e.*, ½% to 1 1/10% (54, 57). But obviously that does not mean that the Steamship Company would not have made a proper rate had full value been declared. The result is that the bill of lading must be taken to mean exactly what it says, and that the Express Company openly agreed that no greater liability than $100 was assumed by the Steamship Company unless *extra* freight as might be *agreed* on should be paid.

The cross-examination of Mr. Potts (58-63) demonstrated that he knew nothing of this shipment and that his testimony about rates was worthless.

In a peculiar sense the Express Company, itself a common carrier—and as such not under the disability mentioned by Mr. Justice Gray in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441—was a competent contractor and could deal at arm's length with the Steamship Company, agreeing that the value of the motor car was not over $100 for the sake of avoiding the payment of

extra freight. As Mr. Justice Day said in *Pierce Co.* v. *Wells, Fargo & Co., supra,* at page 284:

"The facts detailed show that there was nothing unfair in the contract. It was made between competent parties, dealing at arm's length, and for the purpose, so far as the shipper was concerned, of securing the lower rate, it deliberately took upon itself the risk of lessened recovery in case of loss for the sake of the lower rate."

LAST POINT

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED AND THAT OF THE DISTRICT COURT AFFIRMED, WITH COSTS.

Respectfully submitted,

BURLINGHAM, MONTGOMERY & BEECHER,
Proctors for International Mercantile Marine Company.

ROSCOE H. HUPPER,
NORMAN B. BEECHER,
Of Counsel.

March, 1916

Appendix

Rule 15 in Admiralty of the United States District Court for the Southern District of New York:

> "If a defendant shall, by petition on oath, filed before answer, or within such further time as the Court may allow, allege fault in any other party, in respect of the matters complained of in the libel, or shall allege that he is entitled to contribution or indemnity from any other party in respect of such matters, and shall pray that such other party be brought into the suit as a party defendant in analogy with the provisions of Admiralty Rule 59 of the Supreme Court, process on such petition may be issued and the cause shall proceed otherwise as in cases under the 59th Rule."

Rule I in Admiralty of the United States Circuit Court of Appeals for the Second Circuit:

"An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor, that the party appeals to the Circuit Court of Appeals from the decree complained of.

The appeal shall be heard on the pleadings and evidence in the District Court, unless the Appellate Court, on motion, otherwise order."

Rule XI of the General Rules of the United States Circuit Court of Appeals for the Second Circuit:

Assignment of Errors.

"The plaintiff in error or appellant shall file with the clerk of the Court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set

out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the Court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the Court; and errors not assigned according to this rule will be disregarded, but the Court, at its option, may notice a plain error not assigned."

REID *v.* FARGO, AS PRESIDENT OF THE AMERICAN EXPRESS COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 279. Argued March 13, 1916.—Decided June 12, 1916.

In the Second Circuit, the practice is well established that an appeal from the decree of the District Court to the Circuit Court of Appeals in an admiralty case by one of the parties opens the case for a trial *de novo*. *Irvine* v. *The Hesper*, 122 U. S. 256.

The owner of an automobile delivered it to an express company in London to forward to New York, declaring its value to be far in excess of $100; the express company boxed it and delivered it to a carrier and accepted a bill of lading with a limitation of $100 liability; on arrival at destination a stevedore discharged the cargo and the rope by which the automobile was being hoisted broke and the automobile was seriously damaged: in a suit *in personam* in admiralty against the express company and to which the carrier and the stevedore had been made parties held *that:*

The breaking of the rope in this case illustrates, as by analogy, the rule of *res ipsa loquitur* and throws the responsibility on the stevedore furnishing the rope and handling the article, unless such breaking can be explained as resulting from a hidden defect, which in this case is without support in the evidence.

The breaking of the rope appearing from the evidence to have probably resulted from straining and cutting, the stevedore was responsible for the damage and the decree should be against him primarily.

In case of failure to collect from the stevedore the carrier is responsible to the extent of the limited amount stated in the bill of lading, and in case there is still a deficiency, the express company, even though only a forwarder, is liable by reason of having, without the authority of the shipper and with knowledge of the value of the article entrusted to it, accepted from the carrier a bill of lading limiting its liability.

THE facts, which involve the jurisdiction and power of the Circuit Court of Appeals on appeal from the Dis-

trict Court in Admiralty and the liability of forwarders, carriers and stevedores in connection with the shipment and delivery of an automobile, are stated in the opinion.

Mr. Oscar R. Houston, with whom *Mr. Howard S. Harrington* was on the brief, for petitioner.

Mr. Walter F. Taylor for Fargo, President.

Mr. Coscoe H. Hupper, with whom *Mr. Norman B. Beecher* was on the brief, for International Marine Co.

Mr. Livingston Platt, with whom *Mr. Frank H. Platt* was on the brief, for T. Hogan & Sons.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This controversy thus arose: In December, 1910, Reid, the petitioner, delivered in London to the American Express Company an automobile to be carried to New York. The Express Company, in a communication concerning the shipment, was informed that the car was worth about $3,900. The car was boxed by the Express Company and by it delivered to the Minnewaska, a steamship belonging to the International Mercantile Marine Company, bound for New York. The Express Company shipped the car in its own name as consignor to itself in New York as consignee and no express notice was given to the ship of the real value of the package and its contents. The bill of lading issued by the Steamship Company expressly limited the liability to $100 and contained the following clause: "It is also mutually agreed that the value of each package shipped hereunder does not exceed $100, or its equivalent in English currency on which basis the freight is adjusted, and the Carrier's liability shall in no case exceed that sum, unless a value

in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid." On the arrival of the ship at New York, T. Hogan & Sons, Incorporated, stevedores, were employed to discharge the cargo. A sling was placed around the box containing the car and a fall with a hook attached to it was affixed to the sling and by a winch the car was lifted up from the hold through the hatchway. When it had passed above the hatchway a hook attached to another tackle was fastened to the sling, this second tackle being used to swing the package toward and over the side of the ship to land it on the pier. This was not accomplished, however, because as the package swung over the side of the ship toward the pier the sling broke and the car fell into the water and was seriously damaged.

In November, 1911, Reid filed his libel in the District Court of the United States for the Southern District of New York against the Express Company to recover from it the amount of damage caused to the automobile. Before answering the Express Company, in conformity to Admiralty Rule 59 of this court (210 U. S. 565) and with Rule 15 in Admiralty for the Southern District of New York,[1] filed two petitions, one against the Steamship Company and the other against Hogan & Sons, to make them parties defendant on the ground that if there was any liability on the part of the Express Company

[1] Rule 15 in admiralty of the United States District Court for the Southern District of New York is as follows:

If a defendant shall, by petition on oath, filed before answer, or within such further time as the court may allow, allege fault in any other party, in respect of the matters complained of in the libel, or shall allege that he is entitled to contribution or indemnity from any other party in respect of such matters, and shall pray that such other party be brought into the suit as a party defendant in analogy with the provisions of Admiralty Rule 59 of the Supreme Court, process on such petition may be issued and the cause shall proceed otherwise as in cases under the 59th Rule.

on the libel of Reid, both the Steamship Company and Hogan & Sons were responsible therefor, and asking a decree over against each of them separately in case there was any decree against the Express Company. Thereupon the Express Company answered the original libel denying responsibility on the ground among others that it was a mere forwarder. Subsequently both Hogan & Sons and the Steamship Company answered not only the petitions of the Express Company making them parties defendant but also the original libel, traversing the alleged liability on various grounds. The latter company, however, referring to the limitation of liability to $100 in the bill of lading which it had issued, admitted its responsibility to that extent and alleged that the sum thereof had been offered and declined.

In March, 1913, an interlocutory decree was entered holding that Hogan & Sons were primarily responsible and that the Express Company was secondarily so, and that when the amount of the loss was ascertained Reid would therefore have the right to recover the amount from Hogan & Sons, and in addition to recover from the Express Company any part of the sum which he was unable to collect under execution from Hogan & Sons. The final decree which thereafter fixed the amount at $2,724.40 carried out the interlocutory decree. Nobody appealed from the interlocutory decree and the Express Company did not appeal from the final decree fixing its secondary liability. Hogan & Sons, however, did appeal. The court below, considering that on the appeal the case was before it for a trial *de novo* and therefore that the rights and liabilities of all the parties must be considered from that point of view, reversed the decree below and held that error had been committed in the decree rendered against Hogan & Sons, because the proof did not establish that they had been negligent. As to the Express Company it was also held that error had been

committed in decreeing it to be liable secondarily because in receiving the automobile it had acted in the capacity of a mere forwarder and had discharged its obligations in that respect. As to the decree which dismissed the Steamship Company, it was held that error had been committed because that company as an insurer was liable, not however exceeding the amount of $100, the limitation stated in the bill of lading. As the result of the allowance of a petition for certiorari the correctness of these conclusions is now before us for decision.

At the threshold it is insisted that the court below had no authority to consider the case as before it for a new trial, that is, *de novo*, and to award relief upon that theory, and that consequently it erred in reviewing the interlocutory decree which was not appealed from by which the Steamship Company was dismissed and allowing a recovery against that company, and also in reviewing both the interlocutory and final decrees so far as it was essential to grant relief to the Express Company because that company had not appealed. It is not denied that in the Second Circuit the right to a *de novo* trial was considered as settled by *Munson S. S. Line* v. *Miramar S. S. Co., Limited*, 167 Fed. Rep. 960, and that a well-established practice to that effect obtained, but it is insisted that a general review of the adjudged cases on the subject will show the want of foundation for the rule and practice. But we think this contention is plainly without merit and that the right to a *de novo* trial in the court below authoritatively resulted from the ruling in *Irvine* v. *The Hesper*, 122 U. S. 256,—a conclusion which is plainly demonstrated by the opinion in that case and the authorities there cited and the long continued practice which has obtained since that case was decided and the full and convincing review of the authorities on the subject contained in the opinion in the *Miramar Case*. Entertaining this view, we do not stop to consider the various arguments

which are here pressed upon our attention tending at least indirectly to establish the non-existence of the right to the trial *de novo* in the court below or that this case for reasons which are wholly unsubstantial may be distinguished and made an exception to the general rule, because to do so would serve no useful purpose and would be at least impliedly to admit that there was room to discuss a question concerning which there was no room for discussion whatever.

It is conceded that if the grounds relied upon to fix liability as against the Express Company, the Steamship Company and Hogan & Sons are established, there is a right to an independent recovery as to each, whatever may be the recourse of these parties to recover over as against each other. Which of the defendants, if any, was liable primarily for the loss, is then to be considered. We first approach this question from the point of view of Hogan & Sons, because undoubtedly that company was in possession and control of the car at the time it dropped into the river and was damaged. While there is some confusion and various slight contradictions in the testimony, we are of the opinion that the trial court was right in holding that the loss occurred through the fault of Hogan & Sons, and therefore that the court below erred in reversing the decree against that company. And without undertaking to review the testimony, to all of which we have given a careful consideration, we content ourselves with briefly pointing out the general points of view which have led us to the conclusion stated. Without saying that the mere fact of the dropping of the automobile into the water in the course of delivery from the ship's hold to the pier serves to speak for itself on the issue of responsibility, that is, to bring the case within the principle of *res ipsa loquitur*, we are of the opinion that by analogy the case well illustrates that rule for this reason: Some cause must be found for the dropping of the car into the river, and only

two theories on this subject may be deduced from the proof, either that the accident to the car occurred without fault as the result of the breaking of the rope composing the sling because of some unseen and hidden defect in such rope, or that it was occasioned by some act of negligence or want of care in handling the car. The first, we are of opinion, is without any substantial support in the proof; in fact, to accept it would conflict with direct and positive proof to the contrary. That view, therefore, could only be sustained by substituting imagination for proof. The second, on the contrary, we are of opinion, finds cogent support from the proof which could only be escaped by overthrowing it by the process of imagination to which we have just referred. It is unquestioned that when the sling was put around the box containing the car preparatory to attaching the hook in order to hoist it, no blocks or other means were used to prevent the rope from being worn or cut by the edges of the box. The presumption that the rope was strong and efficient, arising from the fact that it held the weight of the box until it was lifted above the hatch and until by the swinging motion the danger of straining or cutting of the ropes upon the edges was more likely to result, gives adequate ground for the inference that such cutting and straining occurred and led to the severance of the rope and the precipitation of the car into the water. And this inference is supported by various other circumstances which we do not stop to recapitulate.

Were the Steamship Company and the Express Company in the order stated liable to Reid, the libellant, dependent upon his inability to make under execution the amount of the decree from Hogan & Sons, is then the only remaining question. In substance this question, however, is negligible since in the argument at bar it was conceded that T. Hogan & Sons, Incorporated, were amply solvent and that there was no question of their ability

to respond to any decree which might be rendered against them. To avoid, however, all miscarriage of right from any possible, though improbable, change of conditions, without going into detail or stating the considerations which control our conclusion on the subject, we content ourselves with saying, first, that as to the Steamship Company we are of the opinion that on the failure to make the amount of the decree against Hogan & Sons, the libellant will be entitled to recover over against that company to the amount of $100, to which its liability was limited as stated in the bill of lading under which the shipment was made; second, that even looking upon the Express Company as a forwarder, under the circumstances of the case and the terms of the bill of lading under which the car was shipped by that company, the trial court rightly held it liable and that recovery against it on failure to enforce the decree against Hogan & Sons will also obtain.

It follows that the decree below must be reversed and the cause remanded to the trial court with directions to set aside its decree in so far as it dismissed the Steamship Company from the case and to enter a decree in conformity with this opinion.

Reversed and remanded.